SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 42

FRED L. SHUTTLESWORTH, PETITIONER,

vs.

CITY OF BIRMINGHAM, ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR CERTIORARI FILED MARCH 7, 1968

CERTIORARI GRANTED APRIL 22, 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1207

FRED L. SHUTTLESWORTH, PETITIONER,

vs.

CITY OF BIRMINGHAM, ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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PROCEEDINGS IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

Case No. 25988

CITY OF BIRMINGHAM, A Municipal Corporation,

Plaintiff,

—VS.—

FRED L. SHUTTLESWORTH,

Complaint

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Fred L. Shuttlesworth within twelve (12) months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did take part or participate in a parade or procession on the streets of the City without having secured a permit therefor from the commission, contrary to and in violation of Section 1159 of the General City Code of Birmingham of 1944.

WILLIAM C. WALKER
Attorney for City of Birmingham

FILED IN OPEN COURT
SEPT 28, 1963
JULIAN SWIFT
CLERK CIRCUIT COURT

BY V. D.

[fol. 4]

Demurrers

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
ALABAMA, TENTH JUDICIAL CIRCUIT

No. 25988

CITY OF BIRMINGHAM,

Plaintiff,

—VS.—

FRED L. SHUTTLESWORTH,

Defendant.

DEMURRERS

Comes the defendant, in the above styled cause, and demurs to the Complaint filed against him in this Court, and as grounds therefor assigns the following separately and severally:

1. That the allegations of the Complaint are so vague and indefinite as not to apprise the defendant of what he is called upon to defend.

2. That the Ordinance, under which said Complaint is brought and as applied to this defendant, violates Section 25, Article 1 of the Constitution of Alabama.

3. That the said Ordinance, under which this action is brought constitutes an abridgement of his right to apply to those invested with power of government for redress of grievances or other purposes, violative of rights secured to all persons by the First and Fourteenth Amendments to the United States Constitution.

4. That the said Ordinance is unconstitutional on its face and constitutes deprivation of liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

5. That the said Ordinance, which is the basis of the complaint, constitutes an abridgement of the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the United States Constitution.

6. That to convict defendant under the said Ordinance, the basis of this complaint, would constitute a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

[fol. 5] 7. That the allegations of said complaint are mere conclusions of the pleader.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
Attorney for Defendant

FILED IN OPEN COURT
SEPT 28, 1963
JULIAN SWIFT
Clerk Circuit Court
By VD

[fol. 8]

Motion to Exclude the Testimony and for Judgment

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

No. 25988

STATE OF ALABAMA,
JEFFERSON COUNTY,
CITY OF BIRMINGHAM,

Plaintiff,

—VS.—

FRED L. SHUTTLESWORTH,

Defendant.

MOTION TO EXCLUDE THE TESTIMONY AND FOR JUDGMENT

Comes now Fred L. Shuttlesworth defendant in this cause after all of the testimony and evidence for the City of Birmingham has been given and received in this cause, and moves this Court to exclude said testimony and evidence and to give judgment for defendant, and as grounds for said motion set out and assign the following, separately and severally.

1. The City of Birmingham has not made a case against this defendant.

2. All of the testimony and evidence given in this cause indicates that defendant during the time and on the occasions in question merely exercises rights and privileges given to him as a citizen of the State of Alabama and of the United States of America, and by the First and Fourteenth Amendments to the Constitution of the United States of America.

3. There has been absolutely no evidence introduced by the City of Birmingham, to support the complaint or warrant in this cause.

4. All of the testimony and evidence offered by the City of Birmingham dose not prove defendant guilty of any criminal act or unlawful acts during the time in question.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
Attorneys for Defendant

FILED IN OPEN COURT
OCT 1, 1963
JULIAN SWIFT, Clerk Circuit Court By VD

[fol. 9]

Judgment Entry

Appealed from Recorder's Court
(Violation of Section 1159, General City Code)
Honorable Geo. Lewis Bailes, Judge Presiding

THE STATE,
CITY OF BIRMINGHAM,

—VS.—

FRED L. SHUTTLESWORTH.

This the 30th day of September, 1963, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorneys, Shores and Billingsley, and thereupon came a jury of good and lawful men, to-wit: H. D. Spivey and eleven others, who being duly empaneled and sworn according to Law, before whom the trial of this cause was entered upon and continued from day to day and time to time, said defendant being in open Court at each and every stage and during all the proceedings in this cause; the City of Birmingham files its written Complaint in this cause, and the defendant files demurrer to said Complaint, and said demurrer being considered by the Court, it is ordered and adjudged by the Court that said demurrer be and the same is hereby overruled, and the defendant files motion to quash the jury venire, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; and the defendant being duly arraigned upon the written Complaint of the City of Birmingham, for his plea thereto says that he is not guilty. This the 1st day of October, 1963, the City rests and the defendant files motion to exclude, and said motion being

considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; defendant makes motion to modify stipulation of counsel to present in evidence certain motion picture views, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; and on this the 1st day of October, 1963, said jurors upon their oaths do say, "We the Jury, find the defendant guilty as charged in the complaint, and fix his punishment at a fine in the sum of $75.00 Dollars". It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in the complaint, in accordance with the verdict of the jury in this cause, and that [fol. 10] he pay a fine of Seventy-five Dollars ($75.00) and costs of this cause.

Said defendant being in open Court, and having presently failed to pay the fine of Seventy-five Dollars ($75.00) and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, the said Fred L. Shuttlesworth, perform hard labor for the City of Birmingham for forty (40) days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, the said Fred L. Shuttlesworth, perform additional hard labor for the City of Birmingham for ninety (90) days, as additional punishment in this cause.

Judgment Entry

And the costs legally taxable against the defendant in this cause amounting to Twenty-eight Dollars ($28.00), not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving Twenty-four Dollars ($24.00) taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for eight days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired that the City authorities return the defendant to the County Authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail, for which let execution issue,

[fol. 11] This the 1st day of October, 1963, defendant files motion for new trial and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, defendant duly and legally excepts.

Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at Twenty-five Hundred Dollars ($2500.00), conditioned as required by Law, and defendant duly and legally excepts.

[fol. 12]

Motion for a New Trial

No. 25988

CITY OF BIRMINGHAM,

Plaintiff,

—VS.—

FRED L. SHUTTLESWORTH,

Defendant.

MOTION FOR A NEW TRIAL

Now comes the defendant, in the above styled cause and with leave of the Court first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit: *Oct. 1, 1963* and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following, separately and severally:

1. That the verdict of the Jury and Judgment of the Court, in said cause, are contrary to law.

2. That the verdict of the jury and judgment of the court are contrary to the facts.

3. That the verdict of the jury and judgment of the court are not sustained by the great preponderance of the evidence in the case.

4. The Court erred in overruling the defendant's demurrers filed in this case.

5. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

[fol. 13] 7. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama and the provisions of the Fourteenth Amendment to the United States Constitution.

8. The Court erred in overruling defendant's Motion to Exclude the evidence in this cause.

9. The Court erred in overruling defendant's Motion to Quash the Jury Venire in this cause.

10. For that the Court erred in overruling defendant's Motion to Quash the Venire on grounds that Negroes had

been systematically excluded therefrom, because of their race or color in violation of rights and privileges guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

11. For that the verdict of the jury is based on bias, prejudice and passion against defendant.

12. For that the Court erred in denying defendant's Motion to Declare void and illegal the petit jury drawn to try defendant in this cause, in that there were no Negroes serving on said petit jury.

13. For that the Court erred in denying defendant's Motion to Quash Venire returned against the defendant on the grounds that Negroes qualified for jury service in Jefferson County, Alabama, are arbitrarily systematically and intentionally excluded from jury duty in violation of rights and privileges guaranteed defendant by the Fourteenth Amendment to the United States Constitution.

14. For that the Court erred in overruling defendant's Motion to set aside the verdict of the jury and for judgment in this cause.

[fol. 14]

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.

Attorneys for Defendant

FILED IN OPEN COURT

OCT. 1, 1963

JULIAN SWIFT
CLERK CIRCUIT COURT

VD

Defendant's Refused Charge

DEFENDANT'S REFUSED CHARGES

The following charge was requested by the defendant, in the presence of the jury and before the jury retired, and was refused by the Court, said charge being in writing, and being endorsed separately and severally "Refused Bailes, J." and being in words and figures as follows, to-wit:

Defendant's requested Charge #1

If you believe the evidence in this case, then gentlemen of the jury, you should find the defendant not guilty.

Refused-Bailes, J.

[fol. 15]

Sentence

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

APPEAL BOND—HARD LABOR SENTENCE

KNOW ALL MEN BY THESE PRESENTS, That we F. L. Shuttlesworth principal, and Jas. Esdale & Willie Esdale as sureties, are held and firmly bound unto the State of Alabama in the sum of Twenty Five Hundred & no/100 ($2500.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama as against this bond.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, the above bounden F. L. Shuttlesworth was on the 1 day of Oct. 1963. convicted in the Circuit Court of Jefferson County, Alabama, for the offense of Parading Without A Permit—Gen City Code Sec No 1159 and had assessed against him a fine of $75.00 Seventy Five & No/100 Dollars, together with the cost of this prosecution, and on the 1 day of Oct. 1963, on failure to pay fine was sentenced to perform hard labor for the County for ..... days, and an additional term for the cost, at the rate of seventy-five cents per day, and as additional punishment imposed the defendant was sentenced to perform hard labor for the County for 90, from which sentence the said F. L. Shuttlesworth has this day prayed and obtained an appeal to the Court of Appeals of Alabama.

Sentence

NOW, IF THE SAID F. L. Shuttlesworth shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the appeal is dismissed, the said F. L. Shuttlesworth shall surrender himself to the Sheriff of Jefferson County, at the County Jail, within fifteen days from the date of such affirmation or dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

Given under our hands and seals, this the 1 day of Oct. 1963.

[fol. 16]

F. L. SHUTTLESWORTH (L.S.)
JAS. ESDALE (L.S.)
WILLIE ESDALE (L.S.)
By JAS. ESDALE, Atty in fact (L.S.)
ESDALE BAIL BOND CO (L.S.)
By JAS. ESDALE (L.S.)
Atty. in Fact.

Approved:

JULIAN SWIFT
Clerk of the Circuit Court of Jefferson County.

FILED IN OFFICE

OCT. 1, 1963

JULIAN SWIFT
Clerk

[fol. 17]

Transcript of Evidence

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR JEFFERSON COUNTY, ALABAMA

Case No. 25988

CITY OF BIRMINGHAM,

Complainant,

—VS.—

FRED SHUTTLESWORTH,

Respondent.

CAPTION

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable George Lewis Bailes, Judge Presiding, and a jury, on the 30th day of September, 1963, commencing at or about 3:00 P.M., Jefferson County Courthouse, Birmingham, Alabama, when the following proceedings were had and done:

APPEARANCES:

William C. Walker, Assistant City Attorney, City Hall; and Lewis Wilkinson, Assistant City Attorney, City Hall, for the Complainant.

Arthur Shores and Orzell Billingsley, Jr., Masonic Temple Building, Birmingham, Alabama, for the Respondent.

PROCEEDINGS:

The Court: Both sides ready?
Mr. Walker: We are ready.
Mr. Billingsley: Yes, sir.

The Court: And you want to present, first, the demurrer to the complaint?

Mr. Shores: Well, first the motion to quash venire. We submit on our demurrers.

The Court: I would hear you on the question of submitting them.

[fol. 18] Mr. Billingsley: Your Honor, we don't necessarily wish to argue the motion to quash venire, we are going to file another motion after the jury is empaneled, which I think will take care of some of the situation.

The Court: Very well, let the motion to quash venire be overruled.

Mr. Billingsley: We take exception.

The Court: And next would be the demurrer.

Mr. Billingsley: Yes, sir, the demurrer.

The Court: Let the record show the demurrer to the City's complaint is overruled.

Mr. Billingsley: We take exception, Your Honor.

The Court: Is this Case No. 25988?

Mr. Shores: That is right.

(Whereupon, a jury venire was sent for and entered the Court Room at 3:40 P.M., were duly qualified by the Court, identified, and special questions were asked by counsel on behalf of the respective parties and the following occurred:)

The Court: Now, the hour being what it is, what is the pleasure of counsel in the case?

Mr. Shores: We would like to recess until in the morning, Your Honor.

Mr. Walker: I have no objections to that, Judge Bailes.

The Court: Very well, in the morning. The next thing that the law requires me to say is please do not mention

the case to anyone of your brethren on the jury, nor to any member of the family, nor to anybody anywhere. Do not mention the case until you have heard all the evidence in the case and have retired to your room for deliberation, before you ever say anything about the case. With that little reminder, I bid you to be at leisure until 9:00 A.M. [fol. 19] in the morning.

(Whereupon, proceedings were in recess from 4:30 P.M., September 30, 1963, until 9:00 A.M., October 1st, 1963, and the following occurred:)

October 1st, 1963 9:00 A.M.

Morning Session

The Court: Counsel ready?
Mr. Walker: Yes, sir.
Mr. Billingsley: Yes, sir.
The Court: Let the jury be brought into the box.

(Jury brought in at 9:10 A.M.)

The Court: Good morning, everybody. Counsel ready?
Mr. Billingsley: We are ready.
Mr. Walker: We are ready.
The Court: I believe the jury was not sworn.
Mr. Walker: I don't think they were.

(Whereupon, the jury was sworn by the Court.)

The Court: Let the cause be stated. Is the complaint—I believe it is already filed.
Mr. Walker: Yes, sir.

(Whereupon, Mr. Walker addressed the jury in opening statement on behalf of the Complainant; following which Mr. Shores addressed the jury in the opening statement

on behalf of the Respondent; following which the following occurred:)

Mr. Walker: Your Honor, are we ready?

The Court: Yes, sir.

Mr. Shores: Judge, we would like the witnesses put under the rule.

(Whereupon, the rule was invoked on the witnesses; following which the following occurred:)

EVIDENCE ON BEHALF OF COMPLAINANT

Mr. Walker: Call Officer Higginbotham.

[fol. 20] R. N. HIGGINBOTHAM, called as a witness, being first duly sworn, was examined and testified as follows:

Direxat Examination by Mr. Walker:

Q. State your name, please.

A. R. N. Higginbotham.

Q. And occupation?

A. Police Officer for the City of Birmingham.

Q. And, Officer Higginbotham, how long have you been so employed?

A. Eighteen years next month.

Q. Now, what detail are you assigned to with the Police Department?

A. Traffic Division.

Q. Were you working for the Traffic Division on April 12th of this year?

A. I was.

Q. Is that Good Friday?

A. Yes, sir.

Q. Now, Officer Higginbotham, did you have an occasion to see or view a parade on that day?

Mr. Shores: Your Honor, we object to the term "parade". That is a legal conclusion. I think he could go into or frame his questions in such a way as to determine what happened or what he saw or did during the day.

Mr. Walker: Judge Bailes, parade has a well defined meaning and, if anything, would be an ultimate fact.

The Court: Let him answer the question.

Mr. Billingsley: He can ask the witness what happened. He doesn't have to use words of conclusion as to say that they were parading. It would be a conclusion on Mr. Walker's part.

The Court: The Court has ruled.

[fol. 21] Mr. Billingsley: We take exception.

Q. Officer, tell what you saw on that occasion, at that time.

A. I was sitting at 17th Street—at 18th Street and 5th Avenue, when the large crowd of people turned east on 5th Avenue from across the park at 17th Street, and also from 17th Street into 5th Avenue.

Q. Is that the first time you saw this group?

A. It was.

Q. And where were you at that time?

A. I was at the corner of 18th Street and 5th Avenue.

Q. And where was the group, again, please?

A. They was just coming on to 17th Street and 5th Avenue on the 5th Avenue side.

Q. And which direction were they traveling?

A. East.

Q. On which street?

A. 5th Avenue.

Q. Now, do you have any opinion as to how many people were in the group?

A. There was several hundred people.

Q. Several hundred.

A. Yes, sir.

Q. Were they in any kind of formation at that time?

A. There was a formation on the sidewalk on the north side of 5th Avenue. There was also a lot of people to the rear on the south side of the street that didn't seem to be in any formation, just sort of walking along.

Q. You didn't see this parade—

Mr. Billingsley: We object.

Mr. Walker: We withdraw that.

Q. You didn't see this group of people—where they came from, is that correct?

A. No, I didn't.

[fol. 22] Q. Now, what did you do when you saw them at that time, if anything?

A. I observed the crowd approaching. I heard singing going on—

Mr. Billingsley: We are going to object to this line of questioning, until he has tied this Defendant up.

The Court: Give him time.

A. I approached the middle of the block towards 17th Street. I crossed over to the block to the sidewalk with my motor. I got off my motor, and when they got close

enough to me I hollered in a loud voice, "Does anyone in this group have a permit"?

Mr. Billingsley: We object to that line of questioning.

The Court: Overruled.

Mr. Billingsley: We take exception.

Q. Did anyone in this group have a permit?

Mr. Billingsley: We object to that question.

The Court: Overruled.

Mr. Billingsley: We take an exception.

A. I received no answer from the parade at this time.

Q. Now, Officer Higginbotham, did you, at any time, see the Defendant in that group of people?

A. I did.

Q. Where did you see the Defendant?

A. The best I can remember, he was several—in the line across the sidewalk—he was several people back from the front.

Q. Was he in the group?

A. Yes, he was in the group.

Q. And what did you see the Defendant do, if anything?

A. I didn't see him do anything that anyone else wasn't doing.

Mr. Billingsley: We object and ask that that answer be stricken from the record.

The Court: Overruled.

[fol. 23] Mr. Billingsley: It's irrelevant, incompetent, and immaterial, and has nothing to do with the vital issues in this case.

The Court: Overruled.

Mr. Billingsley: Exception.

Q. Officer Higginbotham, who, if anyone, was leading this group of people?

Mr. Shores: Your Honor, we object to the framing of this question. We are not concerned with anyone but the Defendant. I think that the proper question is whether or not the Defendant was leading, would be the proper question.

The Court: Well, please let him answer.

A. I couldn't say who was leading, because they were all the way across the sidewalk and I don't know who was leading.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Officer Higginbotham, where did you first see this group of people that you speak of?

A. As it came on to 5th Avenue from 17th Street.

Q. Did you observe them coming through the park there?

A. No, sir.

Q. You just observed them as they came?

A. I was at the corner of 18th Street.

Q. And at the time how were they marching or walking?

A. They were four to six across the sidewalk all the way across the sidewalk on the north side of 5th Avenue leading east.

Q. And had the street been blocked?

A. No, it hadn't at this time.

Q. Was it ever blocked off at 5th Avenue between 17th and 18th Street, ever blocked?

A. No, now I don't know.

Q. Were you there all the time from the time that you observed them until the time they were arrested?

A. Yes, I was.

[fol. 24] Q. Did you—you don't know whether it was blocked off?

A. I couldn't see, there was some people in the way.

Q. Did you address the group yourself?

A. I did.

Q. And was there any bands along with them?

A. No.

Q. Was there any particular organized sort of formation?

A. The group on the sidewalk was.

Q. The group on the sidewalk was?

A. Right.

Q. What about the other group, I believe you said there was another group to the rear and to the side.

A. There was milling, and there was a large crowd approaching from the back of them. They were all over. They were gathering all the time on the street on the opposite side of the sidewalk.

Q. And who were the group gathering on the opposite side and alongside?

A. I didn't know any of them.

Q. Were they all the one race identity or were they white and black?

A. They were all black.

Q. Did you stop any of the other groups?

A. Everyone stopped at this time that I brought it to a halt, they did.

Q. How did you determine who was marching of the so-called marchers or paraders from the other group?

A. The group to the north side of the sidewalk headed east were signing. They were in—I wouldn't say exactly rows, but they were paired off in fours and sixes and they were the only group that there was singing, or any kind of formation.

Q. The group that was in the formation was paired off in fours and sixes, is that correct?

A. Right.

[fol. 25] Q. And I believe when you said you first observed this Defendant, he was back in one of the other groups?

A. He was in this group on the north side of the sidewalk headed east on 5th Avenue, but he wasn't exactly in the front row. The best I can remember he was in the, maybe, third or fourth row back.

Q. In the group on the opposite side of the street?

A. This was the group that was on the north side of 5th Avenue.

Q. And that was not the group singing?

A. Yes, it was.

Q. Was he part of that group and was he walking? Did you see whether or not he attempted to speak to somebody in this group?

A. That I don't know. I was so busy I don't even know whether he was singing or not.

Q. You don't know whether he was in the organized group, do you?

A. He was in the organized group.

Q. Was there somebody marching along beside, men in two's or three's or four's?

A. There was people around him at this time they was ahead of the other group.

Q. Where was he when you first saw him?

A. The first time that I noticed him was when I stopped the group.

Q. And where were you when you stopped the group?

A. Approximately in the center of the block between 17th and 18th on 5th.

Q. And at the time you stopped the group between 17th and 18th—

A. Approximately in the center of it.

Q. Where was this Defendant?

[fol. 26] A. The best I can remember, he was either two or three rows back from the front of the rows that were leading this, the front ones in the group.

Q. Was he on the outside, or within the group or just what was his position with respect to it?

A. I would say he was approximately in the center.

Q. And at the time you stopped him, were there other groups on either side of the so-called marching group?

A. To the rear, in the center of the street, and coming up on the opposite side of the street.

Q. The other group you speak of, was it out in the center of the street?

A. Yes.

Q. And they was people you speak of as marching there on the sidewalk?

A. Right.

Q. Did they have a band?

A. No band.

Q. Were there any vehicles in this marching group?

A. No.

Q. And all they were doing was marching and singing?

A. That is right.

Q. Did you personally arrest this Defendant?

A. I did not.

Q. Was he arrested at the time the others were arrested?

A. The whole group was under arrest.

Q. What happened to the group after they were placed under arrest?

A. At this time, several other motor scouts and three-wheelers and cars came up and blocked the street behind me. There were several that came up at this time to my assistance and at this time there was a lot of people had turned and started back toward 17th Street.

Q. Now, at that time, these people that were stopped and the other officers came up and blocked off the street, [fol. 27] that meant that no one could move out of the area blocked in, is that correct?

A. At this time I presume.

Q. Not what you presume, what you know and what you saw and did.

A. To the rear of me was blocked, because when I turned around to get on the motor there was several police cars across in back of me.

Q. And then the crowd or group of marchers were blocked in, were they not?

A. To the back of me at this time, they were.

Q. To the back of you at this time. Was this Defendant to the back of you or to the front of you?

A. At this time he was in front of me.

Q. In front of you?

A. Right.

Q. And where was he at that time when the rest of them were placed in patrol cars or buses or something?

A. At this time there was a lot of confusion going on.

Mr. Billingsley: We object to that answer and ask that it be stricken from the record.

The Court: Overruled.

Mr. Billingsley: Exception.

A. There was a lot of rock throwing.

Mr. Billingsley: We object to that. He is not answering the question.

Q. My question was whether or not these people were, whether they were escorted off to the city jail in the bus or in the regular city paddy wagon, and what happened to them at that time?

A. The best I can remember, the patrol wagons came up and we started putting them in the patrol wagons.

Q. Was this Defendant placed in the patrol wagon?

A. At this time, I don't know.

Q. Were you there?

[fol. 28] A. Yes, I was there.

Q. Had he left your view at that time?

A. I left the scene at this time.

Q. Where did you go?

A. I went to the opposite side of the street to assist some other officers.

Q. But you do know he was in the group that was blocked and held there until the patrol wagon was brought?

A. He was in the group that arrived there. Now, what happened to him after that, I don't know.

Q. Did you ascertain where the group was going?
A. No, I didn't.

Mr. Walker: We object to that as immaterial, where the group was going.

Mr. Shores: That is all, Your Honor.

Re-Direct Examination by Mr. Walker:

Q. Now, Officer Higginbotham, what time of the day was this?

A. The best I can remember, it was approximately 2:15 or 2:30.

The Court: P.M.?

A. Yes, sir.

Q. And at the time of this arrest, would you describe to the gentlemen of the jury the circumstances or the conditions that existed then?

Mr. Billingsley: Your Honor, we object to that.

Mr. Walker: Your Honor, they opened the door to that. We have a right to show what the circumstances were.

The Court: Please let the witness answer.

Mr. Billingsley: If Your Honor please, I don't understand the question when he talks about conditions and circumstances—

The Court: The Court has ruled.

Mr. Billingsley: We take exception.

[fol. 29] A. On the morning prior to this—

Mr. Billingsley: We object.

Q. Officer Higginbotham, I mean by the question at the immediate time of arrest, at 2:30 or thereabouts, what were the conditions prevailing at the scene of the arrest, just what was going on?

Mr. Billingsley: Your Honor, we object on the further grounds that this witness is not qualified to tell what was the conditions. I don't understand what condition he is talking about; the conditions in Bessemer or Houston, or about the weather. I don't see that Officer Higginbotham can answer that question and we object to that.

The Court: Overruled.

Q. Officer Higginbotham, just tell what you saw at the time of the arrest.

A. At the time of the arrest there was a lot of loud hollering going on, there was a lot of rocks being thrown, who threw them I don't know. I don't have any idea who threw the rocks, but I know there was a lot of rock throwing. There was a lot of dodging going on.

Mr. Billingsley: If Your Honor please, we would like to object and ask for a mistrial in the case, as his answer was for the purpose of attempting to confuse the men of the jury in this case. He says rock throwing and that type of thing; it needs to be stated about the witness: How does he know rocks were being thrown. Was he hit and what happened to them?

The Court: He will be subject to cross-examination.

Mr. Billingsley: We take exception.

A. And at the time right after we put them under arrest—who the officers were, I don't know—some officer hollers, "We got an officer in trouble". I looked and saw—

Mr. Shores: We certainly object to that. That has nothing to do with the proceedings.

The Court: This, in the intention of the question, was at the time and place of the occasion, or [fol. 30] occurrence, or incident, or episode.

Mr. Walker: Go ahead.

Mr. Billingsley: We take exception. Your Honor.

A. I ran directly across the street through the crowd of people, and at this time we had pushed back the crowd of people to help an officer that was in the crowd at this time. When I got back across the street, which was approximately five or ten minutes later, to the crowd, the other officers had all arrived and the crowd was being pushed back and I didn't know who was arrested or who was taken to jail.

Mr. Walker: That is all.

Re-Cross Examination by Mr. Shores:

Q. Officer Higginbotham, at the time you described what else was going on, did you arrest this Defendant and place any other Defendants under arrest for parading without a permit?

A. I didn't, no.

Q. Then this Defendant, as far as you could ascertain, and the parties you arrested, were not engaged in anything but marching and parading without a permit?

A. That is right.

Q. And that is what you arrested them for?
A. That is right.
Q. You didn't see him throw any rocks?
A. No.

Mr. Shores: That is all.
Mr. Walker: No further questions.

(Witness excused.)

The Court: Who do you have next?
Mr. Walker: Sarah Naugher.

SARAH W. NAUGHER, called as a witness, being first duly sworn, was examined and testified as follows:

[fol. 31] *Direct Examination by Mr. Walker:*

Q. State your name, please.
A. Sarah W. Naugher.
Q. And occupation?
A. Clerk in the City Clerk's office.
Q. And how long have you been so employed?
A. Seventeen years.
Q. And, Mrs. Naugher, what is this book that you hold in your hands?
A. Permit book.
Q. Does that book have any relation to permits for parades?
A. Yes, it does.
Q. What is the relation between that book and parade permits?
A. It contains the carbon copies of the parade permits.
Q. And is part of your duty to keep that book?
A. Yes.

Q. Is that an official book of the City?

A. Yes, it is.

Q. Now, I will ask you if there was any parade permit for any Friday, issued for parades to be held on April 12th?

A. No.

Mr. Billingsley: If Your Honor please, we would like to object to the question on the grounds that the testimony to be given by Mrs. Naugher is irrelevant and incompetent, and immaterial and it has not been established by the City of Birmingham that there was a parade on the date that you were talking about, and I don't see where it has, this whole thing has any relevancy in this case.

The Court: Overruled.

Mr. Billingsley: We take exception.

Q. Was there any permit issued for any parade on April 12th?

A. No.

Q. Was there a permit issued for any procession on that day?

[fol. 32] A. No, sir.

Q. Does that book contain all of the permits that has been issued for parading during the past year?

A. Yes.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Mrs. Naugher, does that book show the applications refused for permits to parade?

A. No.

Q. Only those issued?

A. Yes.

Q. Do you have a list of permits issued between September—what period does that book cover?

A. It covers from 1951 to 1963.

Q. And do you have the list of permits issued between January 1st, and June 1st?

A. Yes.

Q. Would you please list them for me?

A. The Mutual Aid Society of Groveland Baptist Church on March 3, 1963, Mount Pilgrim District Congress on April 11th, and the Central Park Baseball Association on April 15th.

Q. Now, Mrs. Naugher, does the permit indicate the route over which the parade is to take?

A. Yes.

Q. And does it indicate the number of vehicles that are or that there will be vehicles?

A. No.

Q. Does it indicate whether it is going to be on the sidewalk or out in the street?

Mr. Walker: We object to this, unless it is to be shown that the Defendant has the permit.

Mr. Billingsley: The crucial question is: What is a parade. That is the question we have got to determine, whether or not these persons were engaged in a parade or a procession, and the only [fol. 33] way we can find out is by questioning the witnesses to determine whether or not it is a parade.

The Court: Just go along and ask the witness whatever you care to.

Q. Does the permit show whether or not it was given to parade on the sidewalk or out in the street?

A. No.

Q. Mrs. Naugher, I believe you said you have been clerk for seventeen years.

A. Yes.

Q. You have seen a number of these parades, haven't you?

A. Yes.

Q. Have you noticed a parade down the streets or on the sidewalk?

A. In the streets.

Q. All in the street?

A. Yes.

Q. And did you notice whether or not these parades would have bands or vehicles in the procession?

A. Yes.

Q. They would?

A. Yes.

Q. And does one get a permit to picket, or just to parade?

A. No.

Q. Does one get a permit to just walk down the street?

A. No.

Q. Do you know whether or not at time when a group of Boy Scouts or Girl Scouts were going to load up on the bus, whether or not they would have to get a permit to get to the bus?

The Court: That would be a legal question and she wouldn't be competent.

Mr. Billingsley: The vital question is whether or not—what she has in the book there.

A. We have not issued any.

[fol. 34] Q. I believe the City Auditorium—

The Court: We will leave the arguments until we come to the arguments after all the evidence is in.

Q. Have you seen students attending the symphony, walking from the bus to the auditorium?

A. Yes.

Q. Does your book show whether or not they got a permit?

Mr. Walker: We object.

The Court: Sustained.

Mr. Billingsley: Exception.

Q. Do you know whether or not a permit was issued in the early part of September when a number of automobiles paraded up and down the street?

Mr. Walker: We object to anything that happened after the case.

The Court: Sustained.

Mr. Billingsley: Exception.

Mr. Walker: Judge Bailes, Mrs. Naugher is due in the council meeting. Would it be all right for her to leave?

Mr. Shores: We have no objection.

The Court: She may. Who do you have next?

(Witness excused.)

Mr. Walker: Officer Ratigan.

EDWARD RATIGAN, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Walker:

Q. State your name, please.

A. Officer Edward Ratigan.

Q. And your occupation?

A. I am a Police Officer for the City of Birmingham.

Q. How long have you been so employed?

A. Eighteen years.

[fol. 35] Q. Were you so employed on April 12th?

A. I was.

Q. What was your duty on that date?

A. I was stationed in front of the church in the 1400 Block of 6th Avenue North to inform the radio on the activities going on at the church.

Q. What time did you get to the church?

A. I just don't remember, I don't recall at all.

Q. Were you there approximately at 2:00, or a little after?

A. I was.

Q. Now, what, if anything, did you observe at the church at that time? Just tell the jury what, if anything, you saw and heard.

Mr. Shores: Your Honor, we object to what he saw and observed at the church. This parade is supposed to be on the street or the sidewalk.

Mr. Walker: Your Honor, we don't want the evidence—it will show the parade.

Mr. Billingsley: We object to the use of the word parade.

Mr. Shores: We except.

Q. Tell the jury, the gentlemen of the jury, and the Court what you saw on that occasion at the church, and thereafter.

A. Approximately around 2:30 I observed Martin Luther King and A. B. Abernathy and Fred Shuttlesworth and a white man I don't know, leaving the church at the 1400 Block. They came out of the church and marched in two's traveling east on 6th Avenue North in the 1400 Block. They proceeded east down to, down 17th Street. They turned, they turned south on 17th Street to 5th Avenue and then turned east again on 5th Avenue and were stopped in the 1700 Block of 5th Avenue North. During this time they were marching two abreast and they were singing.

Q. And were they in formation?

A. They were in a formation.

[fol. 36] Q. And did you see the Defendant in that group?

A. I observed the defendant from the 1400 Block of 6th Avenue North to the corner of 6th Avenue and 17th Street. When I made the turn I lost the Defendant momentarily crossing in the 1700 Block and 6th Avenue. I picked the Defendant up again within the group in the 1700 Block of 5th Avenue at the corner. He was in the group in the 1700 Block of 5th Avenue, when I went up to make the arrest.

Q. You didn't see him at the time the arrests were made?

A. I did not see him at the time the arrests were made.

Q. Let me see, where is the church located?

A. The church is located on the North side of 6th Avenue within the 1400 block.

Q. On the north side of 6th Avenue within the 1400 Block?

A. Yes.

Q. Officer Ratigan, would you come down and draw a diagram of the route—let's pull this out here. Draw the route this procession or group of people took.

A. (Drawing on blackboard)

Q. Now, Officer Ratigan, where did you first observe the Defendant and the others that you named, King and Abernathy, and Shuttlesworth? Where were they when you first saw them?

A. The first time I saw them on this occasion was coming out of the church on the 1400 Block of 6th Avenue North.

Q. And which direction did they proceed?

A. They came out of the church, marched down the sidewalk, marched along—I was originally here (indicating), cut accross and I followed them on this side of the street (indicating). I followed them down all the way down and they turned here (indicating).

Q. Which direction did they turn?

A. They turned south. It was approximately within this point here (indicating) I lost the Defendant. I came [fol. 37] across him here, and I picked him up, approximately, in here again.

Q. I see. What street did they turn south on? 17th Street is one block south of 6th Avenue North. What street would that be or what avenue?

A. That is 5th Avenue North.

Q. Did you ever see the Defendant on 17th Street?

A. Oh, yes. I picked the Defendant somewhere along in the point here (indicating), and lost him again over here because of this group marching along in here, and

they turned and went east in this group here, and I lost him here, (indicating), somewhere in here, almost to the corner.

Q. Describe the formation you observed this group of people to be in when they left the church, or as they walked along 6th Avenue North.

A. They were marching two abreast and they were approximately forty inches apart.

Q. Who was leading, or who was in front of the group, if you know?

A. There was Martin Luther King was one of the first ones, I don't recall the other one. And directly behind one of the first was this white man, who was the second one on the right hand side. If my memory serves me right, A. D. King was one of the second ones. Fred Shuttlesworth, when I first observed him, was up near the front. He was not in any particular formation of two's. He was alongside of them and as they proceeded down the avenue within the point here, (indicating), approximately in here (indicating), he appeared to be drawing back and giving encouragement.

Mr. Shores: We object to drawing back and giving encouragement.

The Court: Yes, I think what you heard him say, what happened, what you saw him do, would be permissible.

A. He was talking to the crowd, but I did not hear what the Defendant said.

[fol. 38] Q. How many blocks, all told, that you observed the Defendant with the group?

A. Taking into consideration the point that I lost him, I would say approximately three and a half blocks. That

half a block in here (indicating), and that would be one and two (indicating) and I lost him in here and picked him up again in here (indicating). That would be about three blocks, but I lost him entirely in here (indicating).

Q. What was the total distance you observed the group that included the Defendant?

A. I observed the group all along until they came into the 1700 Block, and they were stopped in the 1700 Block of 5th Avenue.

Q. Now, just have a seat, Officer Ratigan.

A. (Witness resumes witness stand.)

Q. Officer, would you describe how the Defendant Fred Shuttlesworth was dressed on this occasion?

A. The Defendant was wearing a black shirt with blue-jean trousers.

Q. Would you describe how Martin Luther King was dressed on this occasion?

Mr. Shores: We object to how he was dressed. He is not on trial. It is irrelevant and incompetent.

Mr. Walker: This is to show that they were acting in unison.

The Court: Let him answer.

A. He was wearing a black shirt and bluejeans as trousers.

Q. And how was Abernathy dressed?

A. The same way.

Q. Did you observe other people on that occasion in similar dress?

A. I don't recall. I don't really recall.

Q. Let me ask you this, were these leaders of the group or the formation?

[fol. 39] A. They were.

Q. And I will ask you if—what is the profession of the Defendant, if you know?

A. I just know what I read in the paper, he is supposed to be a Reverend.

Q. And what is the profession, if you know, of Martin Luther King?

A. He is supposed to be a preacher.

Q. And Abernathy?

A. I am not sure about Abernathy.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Officer Ratigan, I believe you said you observed this Defendant, along with others, from the time they left the church, to the time they were stopped by an officer, and were arrested, is that correct?

A. Right.

Q. And you described the formation as two abreast about forty inches apart, is that correct?

A. That is right.

Q. And that formation persisted from the time they were apprehended or stopped?

A. It did.

Q. And during this time were there other people on the side or behind, walking along the side of these people who were in formation?

A. There were.

Q. And I believe you also stated that this Defendant at no time was in line with a partner, marching two abreast, but he was alongside the line of marchers; is that correct?

A. That is right.

Q. And that was when he moved from your sight, is that correct?

A. It was twice.

[fol. 40] Q. Now, at any time did this formation group themselves into four's and six's?

A. No.

Q. At no time, from the time they began and from the time they were marching alongside in two's, approximately forty inches apart?

A. That is right.

Q. Did you ever get close enough to this Defendant to hear what he said, as he was walking alongside the marchers?

A. No.

Q. You don't know whether he was telling people keep quiet and be orderly or what?

A. I do not.

Q. You did see him speak, from time to time, as he walked along beside the line of marchers?

A. I did.

Q. And his position was no different from that of other persons that walked alongside of the marchers, is that correct? There were others who walked alongside the way he walked?

A. Not the way he walked, no.

Q. He was not in line or in a definite place as the others you saw? He went from place to place, is that right? Is that right, in the line he went from place to place?

A. That is right, but the other people that were talking were away from the curb, were nearer to the houses or to the avenue, whereas the Defendant was to the curb side of the street.

Q. I see, but he was not in the lines of two's?

A. He was not in the line of two's.

Q. And at this time they didn't have any brass band leading them?

A. No.

Q. And they were on the sidewalk, were they not?

A. They were.

[fol. 41] Q. Will you describe just what they were doing, as they marched along the sidewalk.

A. All I recall is that they were marching two abreast. I don't even recall if they were singing.

Q. And they were orderly as they were marching along?

A. Yes.

Mr. Shores: That is all.

Re-Direct Examination by Mr. Walker:

Q. Officer Ratigan, let me ask you one question. In your opinion, how many people were in the formation?

A. When I radioed to the Police Headquarters, I had counted 52 people that had left the church in pairs of two.

Q. And is that all?

A. That is all.

Q. Did you say 52 persons or 52 couples?

A. 52 persons. This was in two's and I counted about 23.

Q. And this group that has been referred to, were they merely spectators?

A. You mean the ones that were marching?

Q. Were there any spectators?

A. There were spectators, oh, yes.

Q. Were those spectators a part of this formation, at this time, when you observed them?

A. No part of them.

Q. What was their relation as compared to the relation of this Defendant to the group that was marching? What was their difference?

A. There were spectators lined up along 6th Avenue up to along the point of the houses, and as this group would march—and the Defendant was to the curb side of the group—then as the group would pass them, the spectators would follow from the rear.

Q. Which side were the spectators on of the formation? [fol. 42] Were they on the side toward the buildings or toward the street?

A. They were toward the buildings.

Q. And which side was the Defendant on?

A. Toward the Street side.

Q. Was he with anybody besides himself?

A. He was just going down the line with the rest of them after he left the church. He was one of the three then, and as they walked along he appeared to be talking to them.

Mr. Walker: That is all.

Re-Cross Examination by Mr. Shores:

Q. I believe you said you did follow the line of marchers until they were arrested?

A. That is right.

Q. Did you participate in the arrests?

A. I participated in the arrests.

Q. Was this Defendant arrested there, at that time?

A. He was not.

Q. He was not arrested along with the others that were?

A. He was not.

Mr. Shores: That is all.

(Witness excused.)

The Court: Who do you have next?
Mr. Walker: Officer Evers.

HERMAN EVERS, JR., called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Walker:

Q. State your name, please.
A. Herman Evers.
Q. And what is your occupation?
[fol. 43] A. City of Birmingham Police Department.
Q. How long have you been so employed?
A. Around ten years.
Q. Now, on April 12th of this year, Officer Evers, what was your detail?
A. I was in the—I was detailed to the downtown area to work and watch for demonstrations that was to take place that afternoon.
Q. Let me ask you this: Where were you—first, is April 12th Good Friday?
A. Yes, sir.
Q. Would you tell the jury and the Court where you were at approximately 2:15 and 2:30 on Good Friday of this year?
A. I was assigned to watch a church in the 1400 Block of 6th Avenue in the City of Birmingham.
Q. And would you—let me ask you this: On that occasion did you see this Defendant?
A. Shuttlesworth?
Q. Yes.
A. Yes, sir.

Q. Do you know the Defendant in this case?

A. Yes, sir.

Q. And how long have you known him?

A. I have known him for about five or six years.

Q. How long did you know him when you saw him, and did you know him when you saw him on that occasion?

A. Yes, sir.

Q. How long have you known him by sight?

A. About five or six years.

Q. Now, where was the Defendant when you first saw him on Good Friday about 2:00 or after?

A. He and one other came up in a car. They got out of the car and walked into the church about 2:05, or somewhere around in there.

[fol. 44] Q. When did you next see the Defendant?

A. When he came out of the church leading the demonstration, approximately 2:30.

Q. How was the Defendant dressed on that occasion?

A. When I first saw him, when he got out of the car he was dressed in a suit. When he came back out he was dressed in bluejeans, pants and jacket, I believe.

Q. In other words, he was dressed differently when he came out of the church?

A. He was dressed differently, yes, sir.

Q. Did you observe a group of people coming out of the church at the same time the Defendant came out?

A. They followed him out, yes, sir.

Q. Who was leading the group of people?

A. Well, there was King and Abernathy and Shuttlesworth?

Q. Which King?

A. A. D. King, I believe.

Q. It was A. D. King that you saw? Now, tell the Court and the gentlemen of the jury how these people were dressed?

A. Best I can remember, they also were dressed in this bluejean attire.

Q. Now, describe the formation, if any, that the group was in.

A. It was a simulated formation. They came out and started walking east on 6th Avenue on the sidewalk in groups of two's and pairs of two's, in a group strung out.

Q. Now, did you see the Defendant on this occasion?

A. I did.

Q. And was the Defendant with the formation?

A. He was in the front, yes.

Q. When was he in the front?

A. From the time he walked out of the church, until the last time I saw him. The last time I saw him was in the 600 Block of 17th Street. I believe it was there by the park.

[fol. 45] Q. Did you see him all the time?

A. On spot occasions as I was riding along with them.

Q. Now, how many, in your opinion, was in this formation; how many people?

A. We counted as they came out and it was approximately 52, when they came out of the church, at that time.

Q. Was there many spectators in the area, at that time?

A. Yes.

Q. Did the spectators join the formation?

A. At a distance.

Q. Where did they joint it?

A. As they crossed it they were on—the church is on the north side of the avenue and the spectators were

standing on the south side and thereabouts. As they crossed 15th Street that is where the spectators started coming in and joining them.

Q. Did they follow them, or did they actually join the group or formation?

A. They were following them.

Q. How many was—of the spectators, were in the group following the procession?

A. In number?

Q. Do you have any opinion as to that?

A. To me it looked like over a thousand.

Q. And they were—what were they doing?

A. They were following behind them singing, just loud comments and talking and all that, just generally a disorderly type crowd.

Q. Officer Evers, let me ask one other question. How long was—what was the distance that this formation traveled, that you observed them? What distance did you observe them traveling?

A. From the church up to 17th Street. They made a right turn at 17th Street and then came to 5th Avenue, and that is where I arrested them, in the 1700 Block of 5th Avenue, about the middle of the block.

[fol. 46] Q. Let me ask you this: Did this Defendant make the turn? Did you see him after the formation turned south on 17th Street?

A. The last time I saw him was when the formation turned south on 17th Street. As I passed them going up to 5th Avenue, after he was there at the Kelly Ingram park.

Q. Did he turn south or do you know?

A. Yes, sir, he was there at Kelly Ingram Park.

Q. Was Kelly Ingram Park on this diagram? You can come down.

A. (Witness goes to blackboard.)

Kelly Ingram Park would be in this area (indicating).

Q. Where was the Defendant, approximately, the last time you saw him?

A. Approximately, in the middle of the block.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Officer Evers, I believe you said you observed the Defendant when he went into the church?

A. I did.

Q. He went in dressed in one attire and came out in another?

A. That is right.

Q. Did you see anybody else go in one way and come out dressed another?

A. Yes, sir.

Q. And you also saw him coming out leading this group of fifty something persons?

A. He and King and Abernathy.

Q. They were in two's, is that correct?

A. Groups of two.

Q. Do you recall who his partner was, if he had a partner?

A. He was in front talking to King and Abernathy.

Q. He was on both sides, first one side and then the other?

[fol. 47] A. Yes, sir. King was on one side and Abernathy was on the other.

Q. And at all times he was at the front?

A. No.

Q. Will you describe his conduct at other times during the procession?

A. His conduct was in a frantic conduct, such as bounding from the front to the rear and waving his arm to come on, telling them to come on.

Q. Did you hear him tell them to come on?

A. Yes, sir.

Q. Was he telling the marchers to come on?

A. Both.

Q. And did you hear him saying anything else about keeping quiet and orderly?

A. No.

Q. All you heard him say was to wave his arms and tell them to come on?

A. That is correct.

Q. How close were you at that time?

A. I was riding on the north side of the street. There were cars back there, and they were on the sidewalk. That is how close they got.

Q. They were on the sidewalk, and you were out in the street riding your motor bike?

A. Motorcycle, yes.

Q. And what were these marchers doing as they left the church until the time they were stopped between 17th and 18th Street on 5th Avenue?

A. Clapping their hands, and singing, and shouting and things like that.

Q. They were not just walking along?

A. Not just walking along the street, no.

Q. I see. And was Ratigan one of the Officers that [fol. 48] assisted in the arrest, Officer Ratigan?

A. Yes, sir.

Q. And did you see him during this time?

A. Yes, sir.

Q. And what was he doing during this time?

A. He was stationed in front of the church at the beginning.

Q. He was stationed in front of the church.

A. Yes, sir.

Q. And when he was stationed in front of the church, did he move along as they marched up the street?

A. Yes, sir.

Q. And if he stated that all they did was just walk along, he was wrong in stating that they didn't do anything else?

A. That is his statement, not mine.

Q. He wouldn't be telling the truth?

Mr. Wilkinson: We object, that would be improper.

The Court: That would be argumentative.

Q. Did you stop them as they reached a point between 17th Street and 6th Avenue?

A. I did.

Q. What did you do when you stopped them, and what did you say, and what did you do?

A. I pulled my motorcycle along the sidewalk, and King and Abernathy dropped down on their knees. And somebody asked them if they had a permit, and nobody answered, and we put them in the wagon.

Q. Was the Defendant there at that time?

A. No.

Q. What was your detail on April 12th, Good Friday of this year?

A. I was assigned to make pictures for the City of Birmingham.

Q. Now, were you assigned—where were you on Good Friday about 2:15 or 2:30?

A. I was in front of the church on 6th Avenue, between 14th and 15th Street.

Q. Now, would you tell the gentlemen of the jury what you observed on that occasion, at that time?

A. Of course, I had been down there sometime before. There was a meeting going on in the church, and approximately at that time they began to come out the front. [fol. 50] They turned to their left, and behind them the marchers, and they marched to 17th Street, and there they turned across the street beside the park, turned to their right and went across the street on 5th Avenue, turned to their left and went on up and directly to in front of the Auto Rental business where they were stopped.

Q. And did you have an occasion to—did you see this Defendant at the time you observed people coming out of the church?

A. I did.

Q. Did they—of the people you observed, did they form any type of formation?

A. They came out of the church in a formation.

Q. Describe that formation, please.

A. It was about three or four wide, and, of course, in front—the front men turned to the left when they came out, and the others in the church turned out and followed the others, went on up the sidewalk.

Q. What was your detail at that time?

A. I was making moving pictures at that time.

Q. Did you make moving pictures of this Defendant, and the group as they came out of the church?

A. I did, as they turned up the street.

Q. And did you observe this group as they proceeded east along 6th Avenue North?

A. Yes, sir.

Q. Did you—were they in formation?

A. Yes, sir, they were in formation.

Q. Did you take moving pictures of that?

A. Yes, sir.

Q. Did you take moving pictures continually from the time they left the church?

A. No, sir, I didn't take them continually. That would be impossible.

Q. But you took moving pictures periodically?

[fol. 51] A. Yes, sir.

Q. Now, have you observed those moving pictures that you took on that occasion?

A. Yes, sir.

Q. Did they fairly represent to the—do they truly represent the facts that you have testified to here?

A. Yes, sir.

Mr. Walker: Your Honor, we would like to show the movies to clarify the testimony that Mr. Jones has given, and if possible, I believe that it will be necessary to locate and to point on the film, rather than show some things that might be prejudicial to this Defendant, in that he might not have been in Birmingham when other parts of the film were taken, but we would like to show, if we could, the part of the film that Mr. Jones took on that occasion of that group of people

coming out of the church where the gentlemen of the jury can better understand the testimony that Mr. Jones has given.

The Court: Any objections?

Mr. Shores: Your Honor, we would like to object on the grounds he stated his movie wasn't continuous. From aught that appears, he might have just taken shots at certain points which would indicate some inconsistency with respect to the whole line of march and not the time he was out of the line. There has been testimony that he was in and out of the line, that he was at one part at one time, and another part at one time, and now if this film doesn't show all of that, we would object to it.

Mr. Walker: Judge Bailes, that very point was raised in a case and I am sorry, I brought the wrong notebook, and I don't have that citation, but I could readily obtain it but that very point has been raised and answered that it is not an excuse for admitting the film.

Mr. Shores: Your Honor, commonsense would appear in that a part of the testimony shows this man at one point and at one part of the line, and another part to the side of the line and another [fol. 52] time in the back or the front. If he has got a film that shows only the points where he was just walking alongside, which is to the benefit of the City, we certainly would say that would be prejudicial unless it shows the whole line of march from the time it left the church until it stopped. If we could view the film out of the sight of the jury and see what it shows before

Q. He was not there at that time?

A. No, sir.

Q. Do you know when he left this group?

A. Like I say, the last time I saw him was in the 600 Block and 17th Street, and then he went on with the [fol. 49] group and we cut them off and let them up to 5th Avenue, and then we put them in.

Q. Did you ever see him when he wasn't on the sidewalk?

A. No, other than crossing the street.

Mr. Shores: That is all.

Mr. Walker: No further questions.

The Court: That is all, you may step down. Who do you have next?

(Witness excused.)

Mr. Walker: Marcus A. Jones, Sr.

MARCUS A. JONES, SR., called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Walker:

Q. State your name, please.

A. Marcus A. Jones.

Q. And occupation?

A. Detective for the City of Birmingham.

Q. How long have you been employed by the City of Birmingham?

A. I have been with the City about 20 years, about 10 years as a detective.

they were permitted to see it, it is possible that we could agree to it.

The Court: Very well, take a little rest period and be at leisure until recalled.

(Whereupon, the jury was excused from the Courtroom at 10:20 A.M.; following which the following occurred:)

The Court: Is it agreeable for the counsel to go in where the machine is?

Mr. Walker: It would be all right.

Mr. Shores: Yes, sir.

(Whereupon, a recess was taken at 10:20 for a viewing of the film; following which the jury entered the box at 10:30; following which the following occurred:)

The Court: Counsel ready for the jury?

Mr. Shores: We are ready, Your Honor.

Mr. Walker: Yes, sir.

The Court: Let the record show that the City offers to present certain motion picture scenes and the stipulation is agreed by counsel on both sides. All right.

(Whereupon, a motion picture was shown; following which the following occurred:)

Mr. Walker: Would you cut it off?

Q. Now, Detective Jones, does the pictures that you have just shown to the jury, does that truly represent what you observed on April 12th, Good Friday?

A. Yes, sir.

Mr. Walker: That is all.

Cross Examination by Mr. Shores:

Q. Detective Jones, how long have you known Reverend [fol. 53] Shuttlesworth?

A. Six or seven years, I am not quite sure.

Q. And you know him on sight, do you not?

A. Yes, sir.

Q. And in making that film you were on the outside of the church when they came out?

A. Yes.

Q. And as they marched up the street, does the film show that they were marching in two's?

A. The way I took it they were marching in three's and four's and sometimes more.

Q. How many came out of the church? In your best judgment, who participated in this so-called march or parade?

A. I couldn't answer that question, because, in other words, as they came out and moved up the street, I moved up to a—in other words, when I left there they were still coming out of the church.

Q. And on each side, were there other groups coming out besides them?

A. As they marched up the street, as they came down the street, you had the people coming out of it, and as they came up the street there was certainly a lot of—a number of photographers following them and a lot of other people following them.

Q. Were you on the side of these people following them?

A. The Police tried to keep them in the middle of the street.

Q. Keep the people in the middle of the street?

A. That is right.

Q. The people were walking down the street?

A. Which group are you talking about?

Q. The group that came out of the church.

A. That is right.

Q. The group that was walking out of the sidewalk, I believe you didn't follow them from the time they left the church until they were arrested?

[fol. 54] A. I ran after them.

Q. You viewed the film that you made, didn't you?

A. That is right.

Q. How many times did you see Reverend Shuttlesworth?

A. I couldn't be sure, I think four times.

Q. What position was he to the group of marchers as they walked along the sidewalk?

A. I believe, in the best of my judgment, at first he was to the front to the right.

Q. And what did he do at that time?

A. The next time?

Q. The first time, what did he do the first time when they came out of the church?

A. I don't know, exactly.

Q. Did he head the line of marchers or did he shake hands and then step aside?

A. That I don't know.

Q. You didn't notice that in the film?

A. I noticed him in the front on the film.

Q. Did you notice whether he remained out in front of the marchers after he came out of the church?

A. No.

Q. The first—second time, where was he?

A. I believe the second time he was coming up from the line of marchers, coming up from the rear?

Q. Coming up from the rear?

A. Yes, sir.

Q. And he was not in front, he was coming up from the rear?

A. Yes.

Q. And what is the next time?

A. At that time he had reached the front.

Q. And at that time, was he talking to people?

A. I think he talked to people all the way up the line.

[fol. 55] Q. All the way up the line?

A. Yes, sir.

Q. You didn't hear what he was saying?

A. No.

Q. Did he talk any outside the line that you noticed?

A. I don't know whether he did or not. I want to think that he said something to one of the photographers. To the best of my judgment, he did.

Q. What were these people in the line of marchers doing?

A. You mean besides marching?

Q. Yes.

A. Some of them were singing.

Q. Was that the marchers or the people following the marchers singing?

A. That I couldn't answer, because I never was in the rear, I was always in the front.

Q. Were you present when the people who were walking along the street were stopped by the Officer between 17th and 18th Street on 5th Avenue?

A. At the time they were stopped, best of my judgment, I was to the side of them.

Q. How far were you from them?

A. Not over fifty feet, I know.

Q. Not over fifty feet? At that time did you see the Defendant?

A. No.

Q. I believe you made pictures of them being loaded into paddy wagons, didn't you?

A. Some of them, not all of them.

Q. Some of them? Did you see the Defendant arrested at that time?

A. No.

Q. In your best judgment, was he arrested at that time?

A. I know he wasn't arrested at that time.

[fol. 56] Q. You know he wasn't arrested at that time?

A. Yes, sir.

Q. And did they arrest all other the people who were in the line of marchers at that time?

A. I wouldn't think so. I wouldn't know. I wouldn't think they did.

Q. Did the Officers, when they stopped these people who were coming up the sidewalk in two's did they block off the line of marchers from the rest of the people at the time they were making the arrest?

A. Arthur, I don't understand what you mean.

Q. I mean as the marchers moved along 5th Avenue, between 17th and 18th Street, they were stopped about mid-way of the block. Now, in the rear was the crowd allowed to come on then, or did the Officers seal off 17th Street and 5th Avenue, have to seal it off?

A. They tried the best they could to seal it off, but it wasn't completely.

Q. How's that?

A. They weren't sealed off completely.

Q. What happened to these people who were sealed off at that time?

A. Do you mean—

Q. That is the marchers?

A. Those that were stopped, what they could they got in a group and marched them on out and put them in the wagons.

Q. Marched the group and put them in the wagons, and this Defendant was not in that group?

A. He was not in that group.

Q. Did you see people move out of the church prior to these so-called marchers coming out of the church?

A. I will answer you the best I can, knowing what your question was. I had been at the church some time, and I had definitely seen people go in and out, but not any group come out.

[fol. 57] Q. Did you take pictures of them too?

A. No.

Q. Had you made pictures previous to that of the people coming in and out of the church?

A. That particular day?

Q. Yes.

A. No.

Q. As a matter of fact, every time you saw somebody come out of the church you made pictures, did you not?

A. No.

Q. Did you make pictures of people at the time who were just walking up and down the street?

A. No.

Q. As a matter of fact, you walked along with one group that came through the park, and as they came

through the park you were making your movies and they came and went down by the Arrow-Smith building.

A. I think you got your information from your partner.

Q. How's that?

A. I think you got your information from your partner. That was another day.

Q. You made pictures—I saw it myself, that is a fact that you saw pictures that you made a picture of people walking through the park.

Mr. Walker: We object.

The Court: I didn't understand the question.

Mr. Shores: We withdraw it, Your Honor. That is all.

The Witness: Could I get this movie projector out of your way?

The Court: Just as you like.

Mr. Shores: Your Honor, we would like to put in evidence the portion of the film depicting the time they came out of the church, and until the time they were arrested.

Mr. Walker: The question is how I would have offered it in evidence myself, Judge Bailes. There is no way of preserving it and to use at the [fol. 58] subsequent trial to go to the Court of Appeals.

Mr. Shores: We can make a print of that section.

The Witness: Arthur, that is all made of the reversible type film, and I don't know if you could make a copy of it. It is all made of reversible and it is not made of the negative stock.

Mr. Shores: We would like to introduce it and he could take it to the Court of Appeals and show it.

The Court: I don't think I understand you.

Mr. Shores: What we would like to do is make this a part of the record, that part that is shown as to the various positions from the time he marked Good Friday, until the time they were arrested.

Mr. Walker: We submit that it is no more capable of that being made a part of the record than the view of the scene where a murder is being committed.

The Court: The Court understood it that a certain section of time, which was given in preview to counsel, should be given to the jury; nothing more and nothing less than this, and the Court thinks that was the stipulation. The Court thinks that was the agreement and that it is covered in the agreement.

Mr. Shores: Your Honor, the only point is, if it is given, it is a part of the record. It is in evidence and the only way the Appellate Court would see whether that is relevant evidence would be if it is a part of the evidence.

The Court: The fact that you counsel agreed to not put it in would relieve that issue.

Mr. Shores: And the statute provides how it would be taken care of in the event there was a review.

The Court: It was not within the stipulation that the film and so forth, would be made to take, physically, the film shown, and make it a part of the record of review for review.

[fol. 59] Mr. Billingsley: Your Honor, there is a method of taking blown up shots.

The Court: The motion is overruled.

Mr. Billingsley: We take exception.

(Whereupon, said film was marked "Defendant's Exhibit 1 for Identification", and the Court Reporter hereby certifies that the reproduction of such film is difficult or impracticable, which fact is hereby certified to the Clerk of the Court.)

Mr. Walker: That is all for the City.

COMPLAINANT RESTS.

Mr. Billingsley: If Your Honor please, we would like to offer a motion in the absence of the jury.

The Court: Very well, it will be necessary for you, please, to retire to the jury room.

(Whereupon, jury retired to the jury room at 10:45; following which the following occurred:)

Mr. Billingsley: If Your Honor please, we would like to offer a motion to exclude the testimony and for judgment for the Defendant on the following grounds: (1) That the City of Birmingham has not made a case against this Defendant. (2) All of the testimony and evidence given in this cause indicates that the Defendant, during the time and on the occasions in question, merely exercises rights and privileges given to him as a citizen of the State of Alabama and of the United States of America, and by the First and Fourteenth Amendments to the Constitution of the United States of America. (3) There has been absolutely no evidence introduced by the City of Birmingham, to support the complaint or warrant in this cause.

(4) All of the testimony and evidence offered by the City of Birmingham does not prove Defendant guilty of any criminal act or unlawful acts during the time in question.

As Your Honor noticed, the testimony in this case does not show that the Defendant was engaged in any violation of the law, as far as parading [fol. 60] is concerned. It further appears that the only thing that anyone was doing, as shown by the film, they were walking the streets of the City of Birmingham, and if it is unlawful to walk the streets of the City of Birmingham in groups, then it is unlawful to walk, for two people to walk the sidewalk.

A parade is very obvious to the Court. It consists of bands, of cars, and many other things, and generally, a parade takes place in the middle of the street.

Your Honor, has heard all the testimony presented by the City, and there is no need, under any circumstances, for the Defendant to take up the time of the Court in this matter, and we ask that the Court grant this motion and we also file this written motion for the record.

The Court: Let the motion be overruled.

Mr. Billingsley: We take exception.

Mr. Shores: Your Honor, before we begin putting on testimony, we would like to have two or three minutes recess to see what witness we are going to put on.

The Court: All right.

(Whereupon, proceedings were in recess from 10:55 A.M. until 11:12 A.M.; following which the following occurred:)

The Court: Counsel ready?

Mr. Shores: We are ready, Your Honor. Ask Mrs. Craig to come in.

EVIDENCE ON BEHALF OF THE RESPONDENT

ROSA LEE CRAIG, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. State your name, please.

A. Mrs. Rosa Lee Craig.

[fol. 61] Q. Where do you live, Mrs. Craig?

A. 1820 Henrietta Drive.

Q. On or about April 12th, Good Friday, did you witness several persons walking from 6th Avenue and 13th Street to 5th Avenue and 17th and 18th Street?

A. Yes, I did.

Q. Where were you when these people first began this walking?

A. I left the church.

Q. You left the church? Were you in that group?

A. I was not.

Q. Did you notice them when they came out of the church?

A. Yes.

Q. How were they grouped?

A. In two's.

Q. In two's?

A. Yes.

Q. Did you see Reverend Shuttlesworth at any time during this, or at the beginning or during this march or walking?

A. Yes, I saw him.

Q. When did you first see him on that occasion?

A. When he left the church.

Q. When he left the church. Was he in line with this group of people that left this church?

A. No, he wasn't.

Q. What was his position? What position did he maintain to this group of people that marched from the church to 5th Avenue and 17th Street?

A. He was out with the rest of the crowd.

Q. Out with the rest of the crowd?

A. And walking.

Q. Did you observe him doing anything at any time as these people walked up the street?

A. He was telling the people to be quiet.

Q. He was telling the people to be quiet?

[fol. 62] Q. And be orderly?

A. Yes, sir.

Q. Did you walk beside this group as they walked up the street?

A. Yes, I did.

Q. What was this group of marchers doing?

A. They was walking along in two's.

Q. Just walking up the street?

A. Yes, sir.

Q. Now, in your best judgment, how many were there that left this church and walked in pairs up the street?

A. About 52.

Q. In your best judgment about 52, or more?

A. Yes, sir.

Q. Did you see the group when they were stopped?

A. Yes, I did.

Q. Was Reverend Shuttlesworth in the group at the time they were stopped? Did you see?

A. No, he wasn't in the group.

Q. Did you see him arrested at that time?

A. No, I did not.

Q. When did you last see him?

A. When I saw him he was just walking along with the crowd.

Q. Was he is the crowd when they were stopped, as you recall?

A. No.

Q. He was not in the crowd when they were stopped?

A. No.

Mr. Shores: I believe that is all. Answer Mr. Walker's questions.

Mr. Walker: No questions.

(Witness excused.)

Mr. Shores: That is all, you may come down. Call Mr. John D. Brown.

[fol. 63] JOHN D. BROWN, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. Speak out so we can hear you. What is your full name?

A. John David Brown.

Q. Where do you live, Mr. Brown?

A. 3836—11th Avenue North.

Q. On or about April 12th, Good Friday, were you in that group of persons who left the church and walked up 6th Avenue to 17th Street and then finally to 5th Avenue, and were stopped by Officers?

A. Yes, I was.

Q. From what point did you leave, did you leave the church?

A. Yes.

Q. About how many of you were in this group that walked from the church to the point where you were arrested?

A. There were 52.

Q. Fifty-two?

A. Yes, sir.

Q. You were in the group when they left the church?

A. Yes.

Q. Will you describe the formation as they left this church? Were they in single file, in two's, or three's or four's?

A. We were in two's.

Q. You were in two's?

A. Yes.

Q. Did you observe Reverend Shuttlesworth at any time from the beginning of the line of march or walking until the time you were stopped?

A. Yes, I did.

[fol. 64] Q. Where did you first see him?

A. First I saw him at the church, and later as we were walking, he was at the side telling us to be orderly, in the front, and then he went to the back.

Q. In other words, he was not paired off with anybody, as you walked up the street?

A. No, he wasn't.

Q. Were you arrested that day?
A. Yes, I was.
Q. Was Reverend Shuttlesworth arrested at the time you were arrested?
A. No, he wasn't.

Mr. Shores: That is all.

Cross Examination by Mr. Walker:

Q. Do you know where the Defendant was at the time the group was arrested?
A. He wasn't up in the front, he was in the back.

Mr. Walker: No further questions.

(Witness excused.)

Mr. Shores: That is all. Call Mrs. Barbara Jean Breedlove.

BARBARA JEAN BREEDLOVE, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. Speak up so that the jury and the lawyers can hear you. Would you state your full name?
A. Bobbie Jean Breedlove.
Q. Where do you live, Miss Breedlove?
A. 1609 Fourth Alley South.
Q. Were you in the group that was arrested for walking up the street on Good Friday?
A. Yes, sir.
[fol. 65] Q. And where did you start?
A. I started from the church; we left the church.

Q. About how many were in your group?

A. About 52.

Q. And how were you—what sort of formation were you in?

A. We was in two's.

Q. You were in two's?

A. Yes, sir.

Q. And did you remain in two's from the time that you left the church until the time you were stopped by the Officers?

A. Yes, we did.

Q. Did you see Reverend Shuttlesworth at that time?

A. I seen Reverend Shuttlesworth when I was coming out of the church and he was directing the crowd to keep orderly, and not have any violence, but he wasn't in the march.

Q. He was not paired off in the march?

A. No, he wasn't?

Q. At the time you were arrested, was he arrested at that time?

A. No, he wasn't.

Mr. Shores: That is all.

Cross Examination by Mr. Walker:

Q. Bobbie, actually, he was telling the marchers, wasn't he, to be orderly, rather than the crowd?

A. He was telling everyone that was marching from the church; I guess he was telling all of the people not to have any disorderly conduct. To me, that is the way it seemed.

Q. Specifically, he was telling the 52 of you to be orderly?

A. Yes, sir.

Q. In fact, he was between the sidewalk and the street, is that not correct?

A. Between—

Q. In other words, the 52 of you were walking down the sidewalk east?

[fol. 66] A. Yes, sir, we was.

Q. And he was between the sidewalk and the street, is that not correct?

A. Well, he was on the sideline. He wasn't marching, if that is what you are trying to find out.

Q. That is not my question. He was not next to the building side?

A. When I seen him he was coming out of the church. We was coming out of the church and marching, and he was to the side of us at the beginning, and he was telling us not to be disorderly and violent, and further on up I did not see Reverend Shuttlesworth.

Q. He was on your left side, is that not correct?

A. He was on the left side coming out of the church.

Q. Now, this group of spectators were lined on the right side, next to the building, is that not correct?

A. On the right side?

Q. Yes, on the right side next to the buildings?

A. I don't remember that.

Q. Well, they weren't out in the street were they?

A. They was people all the way around.

Mr. Walker: No further questions.

(Witness excused.)

Mr. Shores: That is all. Call Reverend Billups.

REVEREND CHARLES BILLUPS, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shores:

Q. Reverend Billups, would you state your full name?

A. Charles Billups.

Q. And where do you live, Reverend Billups?

A. 3516 64th Place North.

Q. Were you present at the church, and did you observe [fol. 67] the persons walking from the church to the time they were arrested for marching or parading wtihout a permit?

A. Yes.

Q. Did you see Reverend Shuttlesworth on that day?

A. Yes, sir, I did.

Q. Were you in the group of persons that were walking or marching?

A. No.

Q. When did you first observe the group of marchers?

A. Well, I was inside the church.

Q. You were inside the church?

A. I walked out, I was right behind the group that was walking and I walked out behind the group.

Q. You walked out behind the marchers?

A. Yes, sir.

Q. Did you observe Reverend Shuttlesworth then, when he came out of the church?

A. Yes.

Q. What position, in respect to the group of people, was he?

A. At first when he came out of the church he shaked Reverend King's hand and then next they marched on in front of him. He stood on the side telling people to be

quiet, and we don't want any violence, don't keep up too much noise. He was moving his hands and then he started walking down beside of the ones that were walking down going east toward the City Hall.

Q. And how were they grouped, in one, or two's, three's, or four's, or in what sort of formation were these people that were marching?

A. In two's.

Q. In two's?

A. Yes, sir.

Q. Did you watch them from the time that they left the church, until they were arrested?

A. I watched from the time when they started and until [fol. 68] 17th Street, and we couldn't go on any further because it was blocked off after the marchers proceeded on down to the Courthouse.

Q. Did you notice whether or not Reverend Shuttlesworth ever got off the sidewalk to talk to anybody in the crowd?

A. He did. He talked to me for a while. He left the people who were walking and spoke to me.

Q. At any time was he a part of the marching group? In other words, was he paired off at that time with anyone?

A. No, he was not.

Q. Did you see the persons when they were stopped between 17th and 18th Street and 5th Avenue?

A. Yes, sir, I did.

Q. Did you see whether or not Reverend Shuttlesworth was arrested at that time?

A. He was not arrested at that time.

Q. He was not arrested at that time?

A. No, sir.

Q. Do you know whether or not that they arrested all the other people that were marching?

A. They did.

Mr. Shores: That is all.

Cross Examination by Mr. Walker:

Q. Reverend Billups, did you see Shuttlesworth at any time after the group turned south on 17th Street off of 6th Avenue?

A. As they turned South off 6th?

Q. Yes.

A. Yes, sir, I did.

Q. Isn't it a fact he ran through the park there?

A. No, he did not. At that time he was by my side. At the time they turned, the marchers, and we were standing there together.

Q. Isn't it a fact he didn't leave the group until after [fol. 69] the arrests started?

A. He left before the arrests.

Q. Before the arrests?

A. That is right.

Q. Where was he before he left?

A. He was in the park. He was in the park and he left the group when they turned. He left back there where they sealed off, where they sealed off the block.

Q. He left the block when he saw the block was sealed off?

A. He left when he saw the block sealed off, that is when he left.

Q. All right. Who was the leader of this formation?

A. Who was the leader?

Q. Who walked in front?

A. There was Reverend King and Reverend Abernathy.

Q. And which Reverend King is that?

A. Reverend Martin Luther King.

Q. And how was he dressed?

A. He was dressed in, I would say, bluejeans and gray shirt.

Q. And how was the Reverend Abernathy dressed?

A. He was dressed the same.

Q. And what about Shuttlesworth?

A. He was dressed the same, had on bluejeans.

Q. How were you dressed?

A. I had on a dungaree coat and full outfit of dungaree and overall.

Mr. Walker: That is all.

Mr. Shores: That is all.

The Court: Who do you have next?

(Witness excused.)

Mr. Shores: Reverend Shuttlesworth.

Reverend Fred L. Shuttlesworth, called as a witness, being first duly sworn, was examined and testified as follows:

[fol. 70] *Direct Examination by Mr. Shores:*

Q. Reverend, for the record, will you state your name?

A. Fred L. Shuttlesworth.

Q. Reverend Shuttlesworth, during April 12th, at which time a group of persons walked from 14th Street and 6th Avenue to approximately middleways of the block on

5th Avenue between 17th and 18th Street; were you present at any time during the time these people left until the time they were arrested?

A. I was present at different positions in the crowd, sometimes on the sidewalk—pardon my hoarseness.

Q. Will you describe your acts from the time this group left the church, until the time you left the group?

A. When Dr. King and Abernathy got to the front door, I shook hands with them and stepped aside, and they proceeded up the sidewalk, so to keep the people who were standing in the street and the sidewalk adjacent from gathering up with them. As such, I cautioned the crowd not to make any noise, and not to join them.

Q. And how were they grouped as they came out of the church?

A. By two's.

Q. By two's?

A. Yes, sir.

Q. And do you know the number of persons who took part in this walking up the street?

A. I didn't count them. They were more than fifty, I would say.

Q. What was the conduct of these people walking up the street?

A. Quite orderly, by two's.

Q. At any time did you join the group and were you paired off with any other persons who were walking up the street?

[fol. 71] A. No, in fact, all of the marchers, I would say, got out before—you see, I stood back to keep the crowd from them, and Abernathy and Dr. King's associate suggested that I come to the front of the crowd and speak with him for a minute or two, so I spoke with him and

stepped back off and about that time the Officers threatened to arrest anybody in the street where the 16th Street was, and so I stopped there and I cautioned the crowd to step back, and I was in the street at this time.

Q. And from time to time you moved away from the marchers?

A. Most of the time I was away from the marchers.

Q. And do you remember counseling them to be orderly and not to resort to any violence?

A. Particularly the group in Kelly Ingram Park. The park had quite a few people in it, so I was off of the sidewalk in the park counseling as best I could.

Q. At what point did you leave the group?

A. I never was with the group, as such. I never did go any further from 17th Street, and I was off the side with Billups and one or two more of them.

Q. And, in other words, after the officers sealed off the people who were grouped together, you were not in the group and didn't go any further, is that correct?

A. It wasn't my intention to march or go any further.

Q. You mean you didn't?

A. Try to go across the block, oh, no.

Q. You didn't go on the 17th Street side?

A. I don't recall going across.

Q. Were you arrested then, when the others were arrested?

Mr. Walker: We object to that when he was arrested.

The Court: Well, let him say.

Q. You were not arrested?

A. No.

Q. You were not with them and you were not arrested at that time?

[fol. 72] A. No.

Q. When were you arrested and charged with parading without a permit?

A. I would imagine it was about an hour or two later, maybe an hour. It might have been between an hour and forty-two minutes later, I was at the motel and two detectives came up and I knew them, and I came to the balcony, and they said to me we want to talk to you, and so I came down and they said you were parading without a permit, we came to get you. So they arrested me.

Q. They arrested you at the motel?

A. I had to go back in to get my coat, but they wanted me to go right then, but I wouldn't go until I got my coat.

Q. You got your coat and you went on at that time?

A. Yes.

Q. And it was then you were charged with parading without a permit?

A. Yes, sir.

Mr. Shores: I believe that is all.

Cross Examination by Mr. Walker:

Q. Reverend Shuttlesworth, how were you dressed on that morning or afternoon when you first went into the church?

A. What I had on when I came out.

Q. You did not change clothes inside the church?

A. Certainly not.

Q. How were you dressed when you came out?

A. As the film shows, blue shirt, and bluejeans, I think they call them.

Q. Was everybody in that group of 52 dressed that way?

A. They were not.

Q. Was Martin Luther King in that group?

A. Was he?

Q. Yes.

A. He was.

[fol. 73] A. He was dressed with bluejeans and shirt.

Q. Was Reverend Abernathy dressed that way too?

A. He was.

Q. Was anyone else dressed that way?

A. You mean in the marchers?

Q. In the marchers.

A. I think that one time, Bernard Lee, one of Mr. King's assistants, was. He was dressed in bluejeans. I was not paying particular attention, but most of the other people wore bluejeans.

Q. Was that supposed to symbolize anything? What was the meaning of those bluejeans.

Mr. Billingsley: We object to that. It is immaterial and irrelevant.

The Court: Overruled.

Mr. Billingsley: We except.

Q. What was the meaning of the bluejeans. Did the leaders wear bluejeans?

A. No. As a matter of fact, I think that sometime before we had a period of mourning, and many people, from time to time, had on bluejeans over a period of a month or more. It just so happened that they had them on that day.

Q. Coincidence?

A. You might call it that, if you like.

Mr. Walker: That is all.

Re-Direct Examination by Mr. Shores:

Q. In other words, you were not dressed for any parade, were you?

A. I had on bluejeans for other purposes.

Q. And there were several other persons who did not take part in that walking that day had on similar type dress?

A. Many people in the crowd had on bluejeans, as I think the film will show.

Mr. Shores: That is all.

Mr. Walker: No further questions.

[fol. 74] (Witness excused)

Mr. Shores: That is the Defendant's case, Your Honor.

Mr. Walker: We have rested.

The Foregoing Was All the Evidence in the Case.

Mr. Billingsley: Your Honor, at this time we would like to renew our motion to exclude the testimony and for judgment.

The Court: The Court renews its ruling.

Mr. Billingsley: All right, we take exception.

The Court: Counsel ready for the arguments?

Mr. Walker: Yes, sir.

Mr. Shores: Yes, sir.

The Court: Gentlemen, that is all the evidence in the case and we will now have the arguments by the attorneys.

(Whereupon, Mr. Walker addressed the jury on behalf of the Complainant in opening argument,

following by Mr. Arthur Shores, who addressed the jury on behalf of the Respondent, followed by Mr. Walker, who closed the argument for the Complainant, there being no objection and exceptions reserved to the arguments, the following occurred:)

The Court: Gentlemen, unless there is an objection on the part of counsel, it would be the Court's pleasure to declare an earlier recess for lunch period and reserve the charge until thereafter. Is that agreeable to both parties?

Mr. Walker: Yes, sir.

Mr. Shores: Yes, sir.

The Court: And, of course, that presupposes that the jury separates and goes to lunch at its own pleasure.

Mr. Shores: That is right, Judge.

Mr. Walker: Yes, sir.

The Court: Very well, under the agreement of counsel, be back at 1:30. Please remember what the law requires me to say about not mentioning the case to anybody, and I will see you at 1:30 P.M.

[fol. 75] (Whereupon, Court was in recess from 11:40 A.M. until 1:55 P.M.; following which the following occurred:)

ORAL CHARGE OF THE COURT

The Court: You have heard the testimony and the summation of counsel. It is the duty of the one sitting as umpire to give you, in charge, the salient points of law governing the case. They are simple and few.

First, the great basic bedrock rule is that any man charged with an offense can come into Court with pre-

sumption of innocence in his favor, which presumption of innocence goes with him until it is overcome by evidence.

The second one is that the burden of proof is always upon the prosecutor, never upon the Defendant.

The third ground rule is a little more difficult. It deals with the measure of proof there must be. The Supreme Court has addressed itself to that third ground, and the books are full of its observations on this third ground, and the best way the Supreme Court had been able to say it is this: You are talking about the measure of proof, how much proof there must be. Well, it starts out by saying the twelve men in the jury box are the twelve judges of the facts, and hearing the facts they shall evaluate the facts and then judge the facts. And to reach the measure of proof, if the jury, as judges of the facts, is convinced beyond a reasonable doubt and to a moral certainty that a defendant is guilty as charged, it is their duty to convict him. On the other hand, if the jury, sitting as the judges of the facts, they are not convinced beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged, it is the jury's duty to acquit him.

Those are the ground rules. Of course, there are some fringe rules. I don't know whether to take up your time or not. Justice Oliver Wendell Holmes has said this: It is the duty—now, the State of Alabama has never said this, but the Supreme Court has said this—It is the duty of a jury to observe the witness that takes the witness [fol. 76] stand, to observe the person, the glitter of his eye, the cut of his chin, the tone of his voice, his manner of walking to the stand and walking away, and his demeanor, and everything about him; and having considered everything about the man, or woman, that takes the wit-

ness stand, if a jury is convinced beyond a reasonable doubt and to a moral certainty that any witness has wilfully sworn falsely, then the jury may, at its discretion, disregard or leave out anything, and everything, such a witness has said; to reject that witness's testimony entirely.

Now, I have a request for a written charge and I believe there were no other written charges. Therefore, gentlemen, having heard the charge as contained in the complaint, you find the complaint and you will have it with you on your table, in your room, for deliberation about six lines, actually. The code of the City put the whole matter in this language—that I believe counsel read to you, a part of it at least—"It shall be unlawful to organize, or hold, or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets, or other public ways of the City, unless a permit therefor had been secured from the Commission," the city government. And the rest of it is descriptive of asking for and securing or not, such a permit.

Then the City comes and says: Fred L. Shuttlesworth, within twelve months of the beginning of the prosecution and within the City of Birmingham, or the police jurisdiction thereof did take part, or participate, in a parade or a procession on the streets of the City without having secured a permit, therefor, from the Commission, contrary to and in violation of Section 1159 of the general code of the City of Birmingham. And it all comes down to this: Did the Defendant take part in, or participate, in a parade or procession.

[fol. 77] And I come back to what I quoted you from the Supreme Courts' definition of the third great basic

rule of this trial and that is: Sitting as the Judges of the facts, to be authorized to render a verdict of guilty, you must be convinced beyond a reasonable doubt, and to a moral certainty, that the Defendant is guilty as charged inside the four corners of that complaint.

If after having heard all the testimony, you, sitting as the Judges of the facts, are not convinced beyond a reasonable doubt and to a moral certainty that that paper and complaint is true, it would be your duty to acquit him.

The penalty clauses, in the event of a finding of guilty, the Defendant's punishment runs from—

Mr. Walker: One penny to one hundred dollars.

The Court: One penny to one hundred dollars.

Any corrections?

Mr. Walker: No, sir.

Mr. Shores: We have none.

The Court: Therefore, gentlemen, please take with you the complaint and these forms of verdict typed just to save you from the tedium of writing them. Please take them and retire to the juryroom and let your first procedure be to elect one of you as your foreman. Thank you and you may take the case.

Mr. Shores: Your Honor, we would like to note an exception to the requested charge by the Defendant.

The Court: If it is marked refused, you automatically have it and it will have to go in the record.

Mr. Shores: Thank you, Your Honor.

END OF PROCEEDINGS

[fol. 80]

PROCEEDINGS IN THE COURT OF APPEALS OF ALABAMA, SIXTH DIVISION

IN THE COURT OF APPEALS OF ALABAMA

No. .....

FRED L. SHUTTLESWORTH,

Appellant,

vs.

CITY OF BIRMINGHAM,

Appellee.

Assignment of Errors

Now comes the Appellant, defendant in the cause below, and shows unto the Court that manifest error has been committed on the trial of this cause in the Court below, to the hurt and prejudice of this Appellant and as grounds of error, assigns the following, separately and severally:

1. The Court erred in overruling the defendant's demurrers filed in this cause (Tr. 3, 4, 5, 8 & 17), to which ruling the defendant duly excepted.

2. The Court erred in overruling the defendant's Motion to Quash Venire (Tr. 4, 5, 8 & 17), to which ruling the defendant duly excepted.

3. The Court erred in overruling defendant's Motion to Exclude the Testimony and for Judgment (Tr. 7, 8, 58, 59 & 73).

4. The Court erred in overruling defendant's Motion for New Trial (Tr. 8, 11 & 12).

Assignment of Errors

5. The Court erred in fixing the defendant's appeal bond in the sum of Twenty-five Hundred ($2500.00) Dollars (Tr. 10).

6. The Court erred in refusing the defendant's request Charge #1, as follows:

"If you believe the evidence in this case, then, Gentlemen of the Jury, you should find the defendant not guilty" (Tr. 13).

/s/ ARTHUR D. SHORES
/s/ ORZELL BILLINGSLEY, JR.
Attorneys for Appellant

I hereby certify that I have served a copy of the foregoing assignment of Errors to the Honorable William C. Walker, Attorney for the City of Birmingham, by United States mail, postage prepaid, this 18th day of December, 1963.

/s/ ARTHUR D. SHORES
Attorney for Appellant

[fol. 81]

Majority Opinion

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1965-66

6 Div. 979

FRED L. SHUTTLESWORTH,

v.

CITY OF BIRMINGHAM.

APPEAL FROM JEFFERSON CIRCUIT COURT

CATES, JUDGE

This appeal was submitted February 27, 1964, and was originally assigned to JOHNSON, J.

Shuttlesworth was convicted by a jury in a circuit court trial de novo. The City charged him with a breach [fol. 82] of its ordinance against parading without a permit. § 1159, General City Code of 1944.[1]

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[1] "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, de-

Pursuant to verdict, the trial judge adjudicated him guilty, fined him $75.00 and costs, and also sentenced him to ninety days hard labor for the City.

There are three questions for decision: (1) whether § 1159, supra, denies, on its face, due process of law; (2) whether or not the ordinance as applied violates *Yick Wo* v. *Hopkins,* 118 U. S. 356; and (3) the sufficiency of the evidence.

I.

Facts

About two o'clock, P. M., Good Friday, April 12, 1963, some fifty-two persons issued from a church on Sixth Avenue, North, in Birmingham. They went easterly on the sidewalk of Sixth Avenue crossing Fifteenth and Sixteenth Streets. At Seventeenth Street they turned south, then at Fifth Avenue east again.

The defendant was one of the first to emerge from the church. Various city policemen saw him thereafter, [fol. 83] sometimes walking along with and sometimes alongside the others, once bounding from front to rear.

The group went along sometimes two, sometimes three, sometimes four, and at one time a witness saw one rank of six abreast. This observed bunching up coincided with the promenaders being blocked by officers parking police cars athwart the crossing at Fifth Avenue and Eighteenth Street.

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cency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

There was no evidence that any of the group jaywalked, or that they got into the vehicular roadway except at designated cross walks. Nor did they obstruct cars or pedestrians nor disobey any traffic lights, or officers directing traffic. The only tendency toward showing disorderly conduct lay in evidence that some of the group sang and clapped hands.

The defense adduced no permit for a procession or parade nor was there evidence of anyone applying for a permit. Conversely, the City's proof showed no permit of record for the day in question.

II.

Background

A procession has been described as an *assembly in motion.* 72 C. J. S., p. 1204, states:

> "* * * a group, especially of persons or of vehicles containing persons, moving onward in an orderly, ceremonious, or solemn manner; an orderly file or formation, especially of marchers; a parade."

The essence seems to lie in the group's having ad hoc and pro tempore exclusive possession of all or part of a public way.

Early—probably when in the grip of his fondness for referring to the public as the "Mob"—Holmes, J., in *Commonwealth* v. *Davis,* 162 Mass. 510, 39 N. E. 113, spawned what Judge Conway of the New York Court of Appeals characterized as "the plenary power [of public [fol. 84] officers] over use of streets and parks." *P.* v. *Kunz,* 300 N. Y. 273, 90 N. E. 2d 455, at 462. Cf. *Kunz* v. *New York,* 340 U. S. 290.

However, though the *Davis* case was approved in the United States Supreme Court (167 U. S. 43), its assurance has been eroded by later First-Fourteenth Amendment cases beginning with *Hague* v. *Committee,* 307 U. S. 496.

Consequently in 1941, we find the court saying in *Commonwealth* v. *Anderson,* 308 Mass. 370, 32 N. E. 2d 684 (hn. 2), concerning an ordinance of Boston as applied to a Jehovah's Witness:

> "* * * there is no suggestion in the agreed facts that the defendant was obstructing traffic, causing danger, or annoying travellers in any way, or that the form of the placards or the writing upon them was indecent, libellous, likely to incite violence or otherwise objectionable. Nor do the terms of the ordinance itself limit its prohibition to instances where these or similar conditions exist. The particular case here presented is one of the unqualified interdiction of a wholly inoffensive display of placards on a public street unless the defendant should submit to the requirement that he first obtain a permit. Whatever result might be reached if the ordinance, by its wording, affected only carefully defined instances of conduct actually inimical to the public interest, or if the proof had disclosed such conduct, we must at least conclude that under decisions by which we are bound the application of this ordinance to this defendant in this instance violated his constitutional right to do what he did without a previous permit from anyone. * * *"

And in the same volume on consolidated appeal, *Commonwealth* v. *Pascone,* 308 Mass. 591, 33 N. E. 2d 522,

we find the same rule again applied with a precise distinction of ratio decidendi in affirming the second case.

Moreover, in express terms the Massachusetts court, in 1947, comes to grips with the *Davis* case, *supra, Commonwealth* v. *Gilfedder,* 321 Mass. 335, 73 N. E. 2d 241 (hn. 3). The opinion confesses puzzlement at how the Supreme Court could speak as it did to its judgment in *Hague* and yet not have overruled *Davis, supra.* The [fol. 85] *Gilfedder* opinion by the distinguished Justice (and later Chief Justice) Qua is worthy of close study as a persuasive and considered precedent as to the use of parks by the public.

Hague was decided in 1939. The history of Mayor Hague's resistance to union activity of virtually all sorts cannot be ignored. Nor can that factor be gainsaid in assessing the 5-2 division in the then membership of the court. The opening paragraph, 307 U. S., at 500, is:

> "The judgment of the court in this case is that the decree is modified and as modified affirmed. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of the case. MR. JUSTICE ROBERTS has an opinion in which MR. JUSTICE BLACK concurs, and MR. JUSTICE STONE an opinion in which MR. JUSTICE REED concurs. The CHIEF JUSTICE concurs in an opinion. MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent for reasons stated in opinions by them respectively."

Carefully analyzed it is obvious that only Mr. Justice Butler (in dissent) was expressly willing to stand by *Davis* v. *Massachusetts,* 167 U. S. 43.

Roberts, J.,[3] said of *Davis*[4] (515):

> "The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks."

[fol. 86] After pointing out that the Jersey City ordinance explicitly required permits *only for public parades or assemblies,* he made this oft quoted statement:

> "* * * Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use

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[3] The writer suspects that Mr. Justice Roberts in *Hague,* was chary of "re-examination of constitutional principles" and hence chose to follow the English practice of distinguishing a prior precedent into such narrow confines that its immurement is that of a tomb.

[4] The Boston ordinance banned (without a permit from the Mayor) firing cannons, or firearms, hawking goods, setting up shows, etc., as well as public addresses.

the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

"We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disburbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."

At this point we pick up the decisions which follow in the train of the *Hague* case. The early '40's saw the emergence of the Jehovah's Witnesses cases.[5]

In *Lovell* v. *Griffin,* 303 U. S. 444, the court had held void an ordinance prescribing a permit to distribute literature.

Then after *Hague,* in 1939, we find:

Schneider v. *State,* 308 U. S. 147 (1939);
Carlson v. *California,* 310 U. S. 106 (1940);

[5] See Harper, *Justice Rutledge and the Bright Constellation,* 46, et seq.

Jamison v. *Texas*, 318 U. S. 413 (1943);
[fol. 87] *Largent* v. *Texas*, 318 U. S. 418 (1943);
Jones v. *Opelika*, 319 U. S. 103 (1943);
Murdock v. *Pennsylvania*, 319 U. S. 105 (1943);
Saia v. *New York*, 334 U. S. 558 (1948);
Kunz v. *New York*, 340 U. S. 290 (1951);
Gelling v. *Texas*, 343 U. S. 960 (1952);
Fowler v. *Rhode Island*, 345 U. S. 67 (1953);
and
Staub v. *City of Baxley*, 355 U. S. 313 (1958).

Against this array, however, stands *Cox* v. *New Hampshire*, 312 U. S. 569, which, unlike the multi-opinion *Hague* decision, came from an unanimous court speaking through Hughes, C. J. This opinion relied heavily on the State Supreme Court's construction in the same case. *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508.

Here, for affirmance, the City of Birmingham claims that *Cox* is decisive. Concededly, there are many similarities between § 1159 of the Birmingham Code of 1944 and the New Hampshire statute there in question.

Corresponding is the broad sweep of licensing: Thus from *Cox*, we find: " * * * no parade or procession upon any public street or way * * * unless a special license therefor * * *." And of like tenor, § 1159 reads: " * * * unlawful to organize * * * any parade or procession or other public demonstration on the streets or other public ways * * * unless a permit * * *."

Administrative mechanics in each are similar. The New Hampshire Act made no exceptions other than to empower the city licensing committee or board to grant "revocable blanket licenses" to fraternal and other like organizations, to theatres and undertakers.

However, the New Hampshire enactment applied not only to parades and processions but also to performances or exhibits comprising theatrical or dramatic representations as well as any open air public meeting upon any ground abutting on a street or public way.

[fol. 88] Moreover, the New Hampshire court, *State* v. *Cox,* made no reference to any prior judicial or administrative interpretation of the statute. Whereupon, the court proceeded to fill in by implication a variety of requirements: (1) reasonableness; (2) uniformity of treatment of applications; and (3) freedom from improper or inappropriate considerations and from unfair discrimination.

It was undoubtedly this gloss of "a systematic consistent and just order of treatment" which facilitated affirmance in *Cox* v. *New Hampshire,* supra.

Since, however, the validity prima facie of § 1159 has not been before any appellate court[6] we find it necessary to examine the unfolding of cases since *Cox.* In *Primm* v. *City of Birmingham,* —— Ala. App. ——, 177 So. 2d 326, we found insufficient evidence.

In passing, we note that in *McMeans* v. *City of Fort Deposit* (Cr. 11, 759-N, U. S. C., M. D., Alabama, September 30, 1965), [Frank, M.] Johnson, J., held an identical ordinance of the City of Fort Deposit to be unconstitutional as applied to the facts.

Nevertheless there are at least two reasons which keep us from using the *McMeans* opinion as authoritative as to Shuttlesworth's appeal.

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[6] A three-judge court presided over by Rives, J., in *King* v. *City of Birmingham* (Civil Action 63-196, U. S. D. C., N. D., Alabama, August 12, 1963), dissolved itself without taking up the constitutionality of § 1159.

First, the facts there recited disclose no parade or procession but rather only peaceful picketing within the protection of *Thornhill* v. *Alabama,* 310 U. S. 88. *Hotel & Restaurant Emp.* v. *Greenwood,* 249 Ala. 265, 30 So. 2d 696 (hn. 21).

[fol. 89] *Second,* the opinion states that the City appeared but did not seek a remand to its Recorder's Court.

Third, we recognize that Judge [Frank M.] Johnson is under the review of, and to that extent is bound by, the decisions of the Fifth Circuit. Indeed, his opinion relies on *Rachel* v. *Georgia,* 342 F. 2d 336, and *Peacock* v. *City of Greenwood,* 347 F. 2d 679, to justify removal under 28 U. S. C. 1443.

We understand that *Rachel* is to be taken up for argument and submission by the Supreme Court of the United States[7] at the current 1965-66 Term, probably in contrast with the Third Circuit's denial of removal in *Anderson* v. *City of Chester, Pennsylvania,* 34 L. W. ——.

III.

First Amendment Freedoms

The last term of the Supreme Court effectively saw the Fourteenth Amendment incorporate—albeit hesistantly—the first eight amendments to the Federal Constitution as part of the due process laid upon the states. Cf. Black, J., dissenting in *Adamson* v. *California,* 332 U. S. 46, with the concurring opinions of Harlan and Goldberg, J. J., in *Pointer* v. *Texas,* 380 U. S. 400.

The First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

[7] Sub nom. *Georgia* v. *Rachel* (No. 147, 1965-66 Term), —— U. S. ——, 34 L. Week 3101.

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[fol. 90] Cardozo, in *The Paradoxes of Legal Science*, at pages 94-96, says:

"'* * * That ill deserves the name of confinement which hedges us in only from bogs and precipices. So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law; and is not, as we are told, "liberty for every man to do what he lists." For who could be free, when every other man's humour might domineer over him? But a liberty to dispose and order freely as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.' Modern research in social science has amplified the thought of Locke, but without changing its essentials. [Citing *Treatises on Civil Government*, book 2, sec. 57.]

"'If liberty is a social conception,' says Hobhouse, 'there can be no liberty without social restraint. For any one person, indeed, there might be a maximum of liberty if all social restraints were removed. Where physical strength alone prevails the strongest man has unlimited liberty to do what he likes with the

weaker; but clearly the greater the freedom of the strong man, the less the freedom of the weaker. What we mean by liberty as a social conception is a right to be shared by all members of society, and very little consideration suffices to show that, in the absence of restraints enforced on or accepted by all members of a society, the liberty of some must involve the oppression of others. . . . Excess of liberty contradicts itself. In short there is no such thing; there is only liberty for one and restraint for another.'"

And at pages 97-99 he continues:

"Bills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise. * * * Liberty became identified with the reign of law. 'Freedom of men under government,' says Locke, 'is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it.' The individual may not be singled out from among his fellows, and made the victim of the shafts of malice. Those who are put over him 'are to govern by promulgated established law, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.'

[fol. 91] "Up to this, there is no restraint upon the scope or force of law so long as it be law, i. e., so long as it be general or equal, a rule as contrasted with an 'extemporary decree.' Liberty means more than this, however, as a concept of social science. It has come to mean more, at least in our own system, as a concept of constitutional law. The concept

in our constitutional development has undergone a steady and highly significant development. The individual may not only insist that the law which limits him in his activities shall impose like limits upon others in like circumstances. He will also be heard to say that there is a domain of free activity that may not be touched by government or law at all, whether the command be special against him or general against him and others. By express provision of the constitution, he is assured freedom of speech and freedom of conscience or religion. These latter immunities have thus the sanctions of a specific pledge, but they are merely phases of a larger immunity which finds expression in the comprehensive declaration that no one shall be deprived of liberty without due process of law. Such at least appears to be the more recent doctrine of the court that speaks the final word. Apart from any enumerated phase of liberty and beyond it, this declaration gives immunity against 'the play and action of purely personal and arbitrary power.' What is personal and arbitrary in mandate and restraint does not gain rationality and coherence because it takes the form of statute. The legislature does not speak with finality as to the measure of its own powers. The final word is for the courts."

Holmes, J., dissenting in *Abrams* v. *United States*, 250 U. S. 616, said:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes

in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should [fol. 92] be externally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. * * * "

From *Poulos* v. *State of New Hampshire,* 345 U. S. 395, per Reed, J., we quote:

"The principles of the First Amendmnt are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion

or instruction. It is a nonsequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable non-discriminatory regulation by governmental authority that preserves peace, order and tranquillity without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion. When considering specifically the regulation of the use of public parks, this Court has taken the same position. See the quotation from the Hague case below and Kunz v. People of State of New York, 340 U. S. 290, 293-294; Saia v. People of State of New York, 334 U. S. 558, 562. In these cases, the ordinances were held invalid, not because they regulated the use of the parks for meeting and instruction but because they left complete discretion to refuse the use in the hands of officials. 'The right to be heard is placed in the uncontrolled discretion of the Chief of Police.' 334 U. S. at page 560, * * *' [W]e have consistently condemned licensing systems which vest in an administrative officials discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. 340 U. S. at page 294, * * *

"There is no basis for saying that freedom and order are not compatible. That would be a decision of desparation. Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference. * * *"

In *Herndon* v. *Lowry,* 301 U. S. 242,[8] and *Freedman* v. *Maryland,* 380 U. S. 51, the court refers in effect to the [fol. 93] preferred position of First Amendment rights of freedom of expression. *Thomas* v. *Collins,* 323 U. S. 516. This priority is also used in *Hague* v. *Committee,* supra. *Edwards* v. *South Carolina,* 372 U. S. 229, and *Cox* v. *Louisiana,* 379 U. S. 536, are recent examples of this formulation.

In our constitutional law freedom of expression can rarely be fettered by a prior restraint on its exercise. Blackstone, Comm. iv., 151, et seq., aptly said:

> "* * * The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published. * * *"

Moreover, abuse of free speech is tolerated more: the stifling is a worse mischief. *Freedman* v. *Maryland,* supra.

Whether we concede that the appellant did or did not participate in a "procession" or "parade," undisputedly he was arrested while walking on a sidewalk. Immediately beforehand he had participated, from aught that appears, in an orderly and presumably lawful assembly.

By merely forbidding citizens to go to (or from) the place of assembly, the right of peaceable assembly could

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[8] "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. * * *"

easily be thwarted. Again we note Blackstone, Comm. i, 134:

> "* * * This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. * * *"

Also, the constitutional protection from unreasonable seizures applies to a seizing of the person. *Ex parte Burford,* 3 Cranch 448 (1806).

Hence, we consider ourselves bound to examine § 1159, supra, giving preference (1) to the constitutional rights [fol. 94] of free expression (e. g., free speech, publication) and of free assembly; and (2) to the implicit right to use the sidewalks for walking.

It is the recognition and regulation of this latter right as being nonexclusive which causes difficulty in legislating and in judicial review of the legislator's choice. This enters into two enquiries: the exent of the power available to regulate and the mode of its exercise.

IV.

Police Power

Code 1940, T. 62, § 654, relating solely to Birmingham, provides:

> "§ 654. The city shall have full, complete, unlimited, and continuous power and authority, from time to time, to adopt ordinances and regulations not inconsistent with the laws of the state and the federal and state Constitutions to carry into effect or dis-

charge the powers and duties conferred by law upon the city, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, orders, comfort, and convenience of the inhabitants of the city, and to prevent and punish injuries and offenses to the public therein, and to prevent conflict and ill feeling between the races in the city by making provisions for the use of separate blocks or parts of blocks for residences, places of abode, and places of assembly by the different races,[9] and to prevent evasions and punish violations of the ordinances and resolutions of the city, and to compel obedience thereto by fine not exceeding one hundred dollars and by imprisonment or hard labor not exceeding six months, one or both, and by revocation of license granted by such municipality upon conviction in the recorder's court for violation of any of said ordinances; provided, however, that this section shall not be construed to authorize the forfeiture of franchises granted by state laws or city ordinances without appropriate legal proceedings; and to the [fol. 95] ends set out in this section the full, complete, and unlimited police powers possessed by the state of Alabama shall be had as though specifically and in detail set out in this section, in so far as it is possible for the legislature of Alabama under the Constitution of Alabama and of the United States to delegate such powers, it being expressly declared

[9] *City of B'ham.* v. *Monk*, 185 F. 2d 859 (B'ham. zoning ordinance); *Buchanan* v. *Warley*, 245 U. S. 60 (1917) (Louisville, Ky., ordinance); *Harmon* v. *Tyler*, 273 U. S. 608 (1927) (New Orleans ordinance); *City of Richmond* v. *Deans*, 281 U. S. 704 (1930) Richmond, Va., ordinance). See also *Robinson* v. *Florida*, 375 U. S. 918.

that nothing contained herein shall be construed as a limitation of or restriction on the police powers granted to the city under general or special laws."

The general municipal law, Code 1940, T. 37, § 455, reads:

"§ 455. Municipal corporations may, from time to time, adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this title, and provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and enforce obedience to such ordinances by fine not exceeding one hundred dollars, and by imprisonment or hard labor not exceeding six months, one or both."

Police power, 16 Am. Jur. 2d, Constitutional Law, § 262, is described (in part) thus:

"While it is generally recognized that it is very difficult and practically impossible to give an exact definition of the police power, many attempts have been made. There is no consensus in favor of any of them, but those definitions are of considerable value as indicating the breadth and scope of this power.

"The expression 'police power,' although capable of use, and sometimes used, in a restricted sense, is frequently used very broadly to include all legislation and almost every function of civil government. Thus, it has been stated that the police power in effect sums up the whole power of government, and

that all other powers are only incidental and ancillary to the execution of the police power; it is that full, final power involved in the administration of law as the means to the attainment of practical justice. And it has been said that the power is only another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, that it is the vast residual power of the state, and that it comprises that portion of the sovereignty of the state which is not surrendered by the terms of the Federal Constitution to the federal government.

"Blackstone defines police power as 'the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, [fol. 96] and inoffensive in their respective stations. Many cases, employing the language of Chief Justice Shaw, define it as 'the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.'"

Knight, J., in *State* v. *Kartus,* 230 Ala. 352, 162 So. 533, said:

"No one, at this time, we take it, would have the temerity to undertake to define the 'police power' of a state, or mark its limitations. * * *"

has been here vested and, of necessity, this Court must declare the 'Permit Ordinance' unconstitutional."

Cox v. *Louisiana,* supra:

"This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York,* supra, at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws. See *Niemotko* v. *Maryland,* supra, at 272, 284; cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

"It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each appli-

In *Hawkins* v. *City of Birmingham*, 248 Ala. 692, 29 So. 2d 281, Foster, J., said of T. 62, § 654, supra (at p. 696): "This power is of course subject to be controlled." See also *City of Birmingham* v. *Birmingham Business College, Inc.*, 256 Ala. 551, 56 So. 2d 111.

Concededly, if the Legislature confers the charter power, a city or town may ordain regulations for the use of its streets and sidewalks. This power cannot, however, extend beyond constitutional bounds.

We are presented with two conflicting concepts. *First*, the use of public ways is subject primarily to going to and fro of the public generally, afoot on sidewalks, with the roadway mainly reserved for wheeled traffic.[10]

Secondly, free speech, the communication of ideas, and free assembly, locomotion, inhere in the use of public places.

[fol. 97] At the outset, we believe that the early case of *Commonwealth* v. *Davis*, supra, treating public property as subject to power to be used exclusively in the will of public authorities as if they were private owners is no longer valid. *Thomas* v. *Casey*, 121 N. J. L. 185, 1 A. 2d 866, rested on *Davis*. *Hague* v. *Committee*, supra, disapproved.

Police power[11] has been held vital for society to hold together: the contrast often is given of anarchy, and

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[10] "Any person engaged in a lawful pursuit has the right to pass on the public streets without interference, threats or intimidation." *Russell* v. *International Union*, 258 Ala. 615, 64 So. 2d 384. Nor is a pedestrian vis a vis a street railway running at grade to be deemed a trespasser. *Birmingham, Ensley, etc., R. R. Co.* v. *Stagg*, 196 Ala. 612, 72 So. 164.

[11] *Jacobson* v. *Massachusetts*, 197 U. S. 11 (smallpox vaccination); *Lieberman* v. *Van de Carr*, 199 U. S. 552 (milk delivery permit).

not the philosophic nirvana-like anarchy. Law and order for the protection of the weak from the strong is in contrast to the law of the jungle.

Emergencies, however, do not create powers: rather they furnish the occasion for the exercise of those conferred. Constitutional law cannot raise itself by its own bootstraps. *Homebuilding & Loan Assoc.* v. *Blaisdell,* 290 U. S. 398.

We do not doubt that § 654 of T. 62 and § 455 of T. 37, supra, confer on the city the power to regulate the use of public streets and places in the interest of accommodating conflicting claims of vehicles and pedestrians. Yet, in so resolving traffic problems the State and Federal Constitutions impose a duty to recognize liberty within a concept of an ordered society.

Basically, we consider that a municipality or a state legislature can require that a permit be first obtained to use the vehicular portion of a street for a parade or procession. Moreover, if the movement overflows onto the pedestrian sidewalk the same ends for control would seem to obtain.

[fol. 98] As to a group walking on the sidewalk of a dedicated street, spaced apart, not blocking others from going to or fro, nor interfering with cross traffic (either pedestrian or vehicular) and demeaning themselves in an orderly and peaceable fashion, we consider there is such a fundamental right to so use the sidewalk that a permit would be the exception. Thus, the City in such a case would have the burden of proving (beyond a reasonable doubt) that (1) no permit was issued and that (2) an abridgement of the rights (either of expression or of locomotion) is warranted by overriding considerations.

Picketing, as currently regulated by spacing the picketers

(both as to fore and aft and abreast), keeping them circulating and yielding the right of way to passers-by, affords a useful illustration.

Ordinarily, a court in reviewing legislation will look at the remedy with the favoring intendment that all rationally connected mischiefs passed through the collective mind of the lawmakers. Thus the inhibition of conduct—though sometimes partly innocent—can find support in the state's police power if aimed at a substantial evil.

Nevertheless, this balancing in First Amendment cases finds the scales weighted in the beginning in favor of the freedom which is sought to be restrained. As Rutledge, J., said in *Thomas* v. *Collins,* supra, at 529-530:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Prince* v. *Massachusetts,* [fol. 99] 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153.
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threat-

ened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *De Jonge* v. *Oregon,* 299 U. S. 353, 364, and therefore are united in the First Article's assurance. * * * "

We conclude that the reference in § 1159 to the factors ("public welfare, peace, safety, health, decency, good order, morals or convenience") are but facets of the police power conferred on the City to enable it to establish and maintain itself as a viable entity. These elements are only the source to which the City may look in choosing the means toward a legitimate end. Police power is not an ever ready dues ex machina.

The enquiry next devolves on whether the City's legislative body has established an appropriate means to prevent abuses in the streets.
[fol. 100]

V.

Does § 1159 Impose An Invidious Prior Restraint?

This question we must answer in the affirmative.

In *Saia* v. *New York,* 334 U. S. 558, the court declared a sound truck permit ordinance void on its face.

Niemotko v. *Maryland,* 340 U. S. 268:

> "This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places. * * * In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, *and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid.* * * *" (Italics added.)

Kunz v. *New York,* 340 U. S. 290:

> "* * * We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

"In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague v. C. I. O.*, 307 U. S. 496, 515 (1939). Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. * * *"

American Civil Liberties Union v. *Town of Cortlandt,* 109 N. Y. S. 2d 165:

"Although in most cases where legislative acts have been struck down, the discretion in administering the [101] licensing power has been placed in administrative official, the rule is no different where the legislative body reserves for itself the administration of the licensing power. In the case of Niemotko v. Maryland, 340 U. S. 268, * * * applications for a license were customarily made first to the Police Commissioner, and, if refused by him, application was then made to the City Council. Even that body was not permitted to have unlimited and uncircumscribed discretion. It is that type of discretion that

cation, free from improper or inappropriate considerations and from unfair discrimination" . . . [and with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . ."' *Cox* v. *New Hampshire,* supra, at 576. See *Poulos* v. *New Hampshire,* supra.

"But here it is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment. It [fol. 102] follows, therefore, that appellant's conviction for violating the statute as so applied and enforced must be reversed."

The only administrative standards are those of the City's basic power virtually in its entirety. The expressions used are couched in the distributive. Hence, a single reference to the Commission's opinion of the public welfare, or of peace, or of safety, or of health, or of decency, or of good order, or of morals, or of convenience would suffice for a permit refusal.

"• • • [The police power of a state] must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."—*Treigle* v. *Acme Homestead Ass'n.,* 297 U. S. 189.

VI

§ 1159 Lacks Ascertainable Standards

If the cohesiveness of the fifty-two pedestrians in having a common starting point and apparent common destination were held to constitute a procession, nevertheless we should be constrained to hold the foregoing ordinance invalid for the lack of ascertainable constitutional standards in determining administratively when a permit shall be granted. *Baines* v. *City of Danville,* 337 F. 2d 579.

So far as we can find, § 1159 has been reviewed directly only once by appellate courts. In *Primm* v. *City of Birmingham,* supra, we held the City had singled out the defendant without showing any nexus between him and any other pedestrians. There, Johnson, J., said:

> "To hold that the acts of * * * Primm were violative of the above parading ordinance would, in effect, require a parading permit to be procured by every conventioneer wearing a large political button attempting to cross a street, or by every sporting enthusiast waving a pennant that denotes his loyalties while proceeding to the field of encounter. * * *"

In *Baines* v. *City of Danville,* supra, approving reference is made to the Model Ordinance Regulating Parades drafted by the National Institute of Municipal Law Officers.

[fol. 103] Hence, we have set out in parallel columns an analysis of the salient features of § 1159 and the Nimlo Model:

Birmingham 1944 Code, § 1159, 2d Par., supra.	Nimlo Model
I. Form of Application	I. (§ 10-304)
A. Written	A. On forms provided by Chief of Police
B. Information	B. Information
1. No. of persons, vehicles and animals.	"(a) The name, address and telephone number of the person seeking to conduct such parade;
2. Purpose.	"(b) If the parade is proposed to be conducted for, on behalf of, or by an organization, the name, address and telephone number of the headquarters of the organization, and of the authorized and responsible heads of such organization;
3. Route (or place of demonstration).	"(c) The name, address and telephone number of the person who will be the parade chairman and who will be responsible for its conduct;
4. Time not required to be given.	

"(d) The date when the parade is to be conducted;

"(e) The route to be traveled, the starting point and the termination point;

"(f) The approximate number of persons who, and animals and vehicles which, will constitute such parade; the type of animals, and description of the vehicles;

"(g) The hours when such parade will start and terminate;

"(h) A statement as to whether the parade will occupy all or only a portion of the width of the streets proposed to be traversed;

"(i) The location by streets of any assembly areas for such parade;

"(j) The time at which units of the parade will begin to assemble

at any such assembly area or areas;

"(k) The interval of space to be maintained between units of such parade;

"(l) If the parade is designed to be held by, and on behalf of or for, any person other than the applicant, the applicant for such permit shall file with the Chief of Police a communication in writing from the person proposing to hold the parade, authorizing the applicant to apply for the permit on his behalf;

[fol. 104]

"(m) Any additional information which the Chief of Police shall find reasonably necessary to a fair determination as to whether a permit should issue.

C. Late application: _____ days before proposed parade.

D. Fee: $.....

II. Exceptions

A. Funeral processions only exception.

II. Exceptions (§ 10-303)

A. Funeral processions.

B. Students going to and from classes, etc.

C. A governmental agency acting within scope.

III. Standards for Issuance

A. "The commission shall grant * * * and prescribing the the streets[12] * * * unless in its judgment:" the permit should be refused because of any one or more of the following:

1. Public welfare;
2. [Public] peace;
3. [Public] safety;
4. [Public] health;

III. Standards (§ 10-305)

"SECTION 10-305. *Standards for Issuance.* The Chief of Police shall issue a permit as provided for hereunder when, from a consideration of the application and from such other information as may otherwise be obtained, he finds that:

"(1) The conduct of the parade will not substantially interrupt the safe and orderly movement of other traffic contiguous to its route;

[12] § 10-308 of NIMLO Model empowers the Chief of Police to issue an alternate permit, i. e., for a different time or route from that proposed.

5. [Public] decency;
6. [Public] good order;
7. [Public] morals; or
8. [Public] convenience.

"(2) The conduct of the parade will not require the diversion of so great a number of police officers of the City to properly police the line of movement and the areas contiguous thereto as to prevent normal police protection to the City;

"(3) The conduct of such parade will not require the diversion of so great a number of ambulances as to prevent normal ambulance service to portions of the City other than that to be occupied by the proposed line of march and areas contiguous thereto;

"(4) The concentration of persons, animals and vehicles at assembly points of the parade will not unduly interfere with proper fire and police protection of, or ambulance

service to, areas contiguous to such assembly areas;

[fol. 105]

"(5) the conduct of such parade will not interfere with the movement of fire-fighting equipment enroute to a fire;

"(6) The conduct of parade is not reasonably likely to cause injury to persons or property, to provoke disorderly conduct or create a disturbance;

"(7) The parade is scheduled to move from its point of origin to its point of termination expeditiously and without unreasonable delays enroute;

"(8) The parade is not to be held for the sole purpose of advertising any product, goods or event, and is not designed to be held purely for private profit."

IV. Appeal Procedure:	IV. Appeal Procedure: (§ 10-307
None, except to courts, presumably by way of mandamus with alternative prayer for certiorari.	"SECTION 10-307. Appeal Procedure. Any person aggrieved shall have the right to appeal the denial of a parade permit to the City Council. The appeal shall be taken within ..... days after notice. The City Council shall act upon the appeal within ..... days after its receipt."

A keystone illustration of the canon of strict (or at least literal) construction of a penal law is found in *McBoyle* v. *United States,* 283 U. S. 25, at 27. There the government tried to apply the Dyer Act to punish theft of an airplane. Holmes, J., concluded:

> "'Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a simi-

lar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. *United States* v. *Thind*, 261 U. S. 204, 209."

[fol. 106] And from a Massachusetts case we quote:

"* * * Prima facie, mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child. This the Commonwealth concedes. Under the ordinance, such conduct continues conditionally lawful subject to a direction to move on by a police officer followed by unreasonable failure to comply and the expiration of seven minutes. Not all idling is prohibited, but only that which is unreasonable. The vice of the ordinance lies in its failure to prescribe any standard capable of intelligent human evaluation to enable one chargeable with its violation to discover those conditions which convert conduct which is prima facie lawful into that which is criminal. A 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Connally v. General Construction Co., 269 U. S. 385, 391. * * *"—*Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666.

Connally v. *General Const. Co.*, 269 U. S. 385, is probably the most frequently cited case in this area:

"* * * The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial defini-

tion, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

In *United States* v. *Cardiff*, 344 U. S. 174, Douglas, J., said:

"All that the Department says may be true. But it does not enable us to make sense out of the statute. Nowhere does the Act say that a factory manager must allow entry and inspection at a reasonable hour. Section 704 makes entry and inspection conditioned on 'making request and obtaining permission'. It is that entry and inspection which § 301 (f) backs with a sanction. It would seem therefore on the face of the statute that the Act prohibits the refusal to permit inspection only if permission has been previously granted. Under that view the Act makes illegal the revocation of permission once given, not the failure to give permission. But that view would breed a host of problems. Would revocation of permission once given carry the criminal penalty no matter how long ago it was granted and no matter if it had no relation to the inspection demanded? Or must the per- [fol. 107] mission granted and revoked relate to the demand for inspection on which the prosecution is based? Those uncertainties make that construction pregnant with danger for the regulated business. The alternative construction pressed on us is equally treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes re-

fusal to allow inspection a crime. However we read § 301 (f) we think it is not fair warning (cf. *United States* v. *Weitzel,* 246 U. S. 533, *McBoyle* v. *United States,* 283 U. S. 25) to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon* v. *Lowry,* 301 U. S. 242."

This general rule of strict construction of penal laws began early in our courts, both state and Federal. Thus, Washington, J., in *United States* v. *Sharp* (1815), Pet. C. C. 118, at 122, said:

"* * * Laws which create crimes ought to be so explicit in themselves or by reference to some other standard, that all men subject to their penalties may know what acts it is their duty to avoid. * * *"

See also *United States* v. *Lacher,* 134 U. S. 624; *United States* v. *Brewer,* 139 U. S. 278; cf. *Nash* v. *United States,* 229 U. S. 373—"restraint of trade" has an ascertainable common law meaning. *Eubank* v. *Richmond,* 226 U. S. 137; *Panhandle Co.* v. *Highway Comm.,* 294 U. S. 613.

By 1914 we find the court subsuming the rule into its concept of due process and under the Fourteenth Amend-

ment rather than the Sixth. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, struck down a state anti-trust law which used "real value." Cf. Kentucky Constitution 1891, § 198.

[fol. 108] In *Winters* v. *New York,* 333 U. S. 507, Reed, J., said:

> "* * * The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' *Cantwell* v. *Connecticut,* 310 U. S. 296; *Pierce* v. *United States,* 314 U. S. 306, 311. * * *
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> * * * * * *
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> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. * * *
>
> "* * * But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stores 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passion,' we find the specifications of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner.

Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crime of violence against the person. No conspiracy to commit a crime is required. See *Musser* v. *Utah*, 333 U. S. 95. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. • • •

• • • • •

[fol. 109] "• • • Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry*, 301 U. S. 242, 259."

In the "Miracle" censorship case, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, the word "sacrilegious" (contrasted with "blashphemous") was held to be fatally vague. Clark, J., there said:

"* * * That statute makes it unlawful 'to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel [with specified exceptions not relevant here], unless there is at the time in full force and effect a valid license or permit therefor of the education department . . .' The statute further provides:

"'The director of the [motion picture] division [of the education department] or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. * * *

* * * * *

"* * * Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the 'sacrilegious' test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the

expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

"Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'"

[fol. 110] Reference may also be had to the following articles: Amsterdam, *The Void-for-Vagueness Doctrine,* 109 U. Pa. L. Rev. 67; Aigler, *Legislation in Vague or General Terms,* 21 Mich. L. Rev. 831; Freund, *Use of Indefinite Terms in Statutes,* 30 Yale L. J. 437; Hall, *Strict or Liberal Construction of Penal Statutes,* 48 H. L. Rev. 748; Hall and Seligman, *Mistake of Law and Mens Rea,* 8 U. Chi. L. Rev. 641; Note, *Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process,* 38 H. L. Rev. 963; Note, *Indefinite Criteria of Definiteness in Statutes,* 45 H. L. Rev. 160; Note, *Void for Vagueness: An Escape from Statutory Interpretation,* 23 Ind. L. J. 272; Horack, *Constitutional Liberties and Statutory Construction,* 29 Iowa L. Rev. 448; Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 Vand. L. Rev. 531; Morris, Case Note, 26 Tex. L. Rev. 216 and Case Note, 33 Va. L. Rev. 203.

Nor is this principle a stranger to our jurisprudence. *Carter,* 243 Ala. 575, 11 So. 2d 764; *Kahalley,* 254 Ala. 482, 48 So. 2d 794.

Mr. Justice Simpson well stated the rule in *Bolin,* 266 Ala. 256, 96 So. 2d 582, where the court on certified question held the stink bomb law void for vagueness. There we find:

> "If the provision can be sustained as constitutional, it must be under the police power of the state which authorizes the imposition of reasonable regulations in the interest of public health, public morals, public safety or the general welfare. Looking to one of the earliest authorities, Blackstone defines this power to be 'the due regulation and domestic order of the kingdom: whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious and inoffensive in their respective stations.' 4 Blackstone Commentaries 162.
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> "Mr. Justice Holmes, speaking for the Supreme Court of the United States in Noble State Bank v. Haskell, 219 U. S. 104, 111, observed:
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> [fol. 111] " 'It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 17 S. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'
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> * * * * *

"It is also settled law that 'In enacting a criminal statute, there is an obligation on the State to so frame it that those who are to administer it and those to whom it is to be administered may know what standard of conduct is intended to be required and legislation may run afoul of the due process clause because of a failure to set up any sufficient guidance to those who would be law-abiding, or to advise a defendant of the nature and cause of an accusation he is called on to answer, or to guide the courts in the law's enforcement.' Kahalley v. State, 254 Ala. 482, 483, 48 So. 2d 794, 795; Seals v. State, 239 Ala. 5, 194 So. 682; Standard Oil Co. v. State, 178 Ala. 400, 59 So. 667; Carter v. State, 243 Ala. 575, 11 So. 2d 764.

"And a person is not required to speculate as to the meaning of a statute at the peril of his freedom. Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888. The intent of the legislature must appear from the face of the statute. Standard Oil Co. v. State, supra."

In the same year, 1957, in *State* v. *Homan,* 38 Ala. App. 642, 92 So. 2d 51, where a trial court had held Code 1940, T. 41, § 221, subdiv. 3, unconstitutional, we reversed. The opinion compasses a number of Alabama cases both of imprecise words and constitutional holdings:

"We are cited to the peeping tom case, Kahalley v. State, 254 Ala. 482, 48 So. 2d 794, 795. The gist of the offense there was for any male person to go 'near and stare * * * into any room * * * not his own or under his control, which is occupied by any female

person * * * .' This case in turn is bottomed on the Fourteenth Amendment to the Federal Constitution via Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, and other cases therein cited.

"And from the Kahalley decision sprang Connor v. City of Birmingham, 36 Ala. App. 494, 60 So. 2d 474. The offense there was that no two persons of opposite sex (except man and wife and parent and minor child) shall occupy jointly and privately any room in any lodging house, hotel, etc.

[fol. 112] "These cases illustrate what, in the absence of concepts of due process, would nevertheless be obnoxious criminal legislation. Thus in Kahalley the fallacy is exposed by the question, 'How far is near?' In Connor the language, though unambiguous, is so broad and sweeping as to raise a presumption that the legislator would not have so intended unless he had added all inclusive words, and absent the all inclusive words the courts would not attempt to re-legislate, 36 Ala. App. at page 499, 60 So. 2d at page 477.

"Subdivision 3 of Section 221 [T. 41], supra, is severable * * * . * * * we are of the opinion that there is no denial of due process of law nor is the language of the subdivision so vague as to be meaningless. There are no imprecise words such as 'profiteering', 'necessity of life', State v. Goldstein, 207 Ala. 569, 93 So. 308, 'profit, gain or advantage, unusual in the ordinary course of legitimate business', State v. Skinner, 20 Ala. App. 204, 101 So. 327, 329, or 'near', Kahalley v. State, supra. See also Parisian Co. v.

Williams, 203 Ala. 378, at page 383, 83 So. 122 at page 127. * * *"

Since the only stated standards for refusing a permit are those of welfare, peace, safety, health, decency, good order, morals or convenience, we—in addition to overbroadness—find these words, as related to a parade, procession or demonstration, *either sufficiently lacking in preciseness or without a settled applicable common law meaning.*

For example, in *Hague* v. *Committee,* supra, Roberts, J., aptly pointed out that peace on the streets could easily be achieved by suppression.

In the context of long drawn out resort to congested courts for relief, these stated "standards"—truly only sources of power, not means to an end—show § 1159 to be void on its face.

VII.

§ 1159 Is Void as Applied

Yick Wo v. *Hopkins,* supra, held that, though a San Francisco ordinance aimed at fire hazards had a valid surface wording, yet its employment against only Chinese laundrymen was discriminatory.

[fol. 113] Here we have no direct evidence of any other persons being charged with a breach of § 1159 on the same occasion as that of instant concern. Nevertheless, the borderline case made here against Shuttlesworth, coupled with even less plausible presentations reviewed in *Primm* v. *City of Birmingham,* supra, and in two other cases decided here on the authority of *Primm,* at the same time as *Primm,* constitute a pattern of enforcement.

In addition to facts listed in the quotation from Judge Johnson's opinion in *Primm* (set out hereinabove), we

excerpt also from the evidence of one of the arresting officers:

"Q. * * * Were you informed by anyone that no permits had been issued for any such demonstrations?

"A. Yes, sir. At roll call before we came to work they read out this ordinance number to us and said no one had received any permits to hold any kind of demonstrations downtown and they read out the ordinance to us."

And of similar import from *Bentley* v. *City of Birmingham*, 6 Div. 938, decided on authority of *Primm*, we extract:

"Q. Is it a fact, Officer, that the fact that some people might come down in the downtown area with signs was discussed that morning at Police Headquarters?

"A. It was.

"Q. And was the section which Ann Bentley is charged with discussed also at that time?

"A. Yes, it was.

"Q. Who did you discuss it with, Officer?

"A. I believe that the Sergeant read—or, either the Captain read out the ordinance and said it was a violation.

"Q. Could you tell us just what he said with reference to this ordinance?

"Mr. Walker: We object. Well, go ahead and answer that.

"A. If I remember correctly, at roll call they read a lot of different things, read auto stolen reports, and read a lot of things that come in there, and if I remember correctly, I believe they read out the ordi-

nance and said carrying signs would be prohibited. [fol. 114] "Q. Did they describe how big the sign had to be?

"A. They did not.

"Q. Was there anything else said there that you remember?

"A. Not that I recall.

"Q. Did they describe what type of conduct other than carrying signs would constitute an offense?

"A. I don't recall any mention of conduct.

* * * * *

"Q. All that you know about it is that she had the sign on, she was not in the company of anybody, she was walking across the street, and in about six seconds she was arrested?

"A. That is correct.

"Q. She didn't create any disturbance, or block the street, or anything else other than that, is that right?

"A. She did not.

"Q. Didn't endanger anybody's safety, so far as you know?

"A. She did not."

Officer ..... (on cross):

"Q. Now, I believe you stated that you were at the roll call that morning when they gave you orders about making arrests for violation of 1159?

"A. They didn't say make an arrest, they just told us what the ordinance number was in case someone was downtown with signs on.

"Q. Wearing signs?

"A. But, they didn't actually say go out and get them.

"Q. Well, now, what were your specific orders with respect to people wearing signs downtown, if anything?

"A. I don't recall any particular orders. They just notified us of what the situation—of what the City Code was pertaining to such an incident.

"Q. And your understanding was that you were to arrest anybody with a sign on?

[fol. 115] "A. My understanding is to arrest anybody violating the City Code to my knowledge.

"Q. We are not asking about the other sections in the City Code, we are asking specifically about 1159. Did you have specific orders to arrest anybody who was wearing a sign?

"Mr. Walker: We object to that, Your Honor.

"Mr. Shores: Your Honor, we are trying to find out whether or not he was given instructions to cover that these individuals blocked the street, or whether the individuals were creating a disturbance with signs, or just what type of sign.

"Mr. Walker: Your Honor, we are not trying the defendant on what the officer thought, or what orders he was under. The only evidence that will be considered is the evidence admitted here in this court room, and whether the officer was under instructions, or acted even without any instructions, that can make no—have no bearing on the case, because it will be decided from the evidence that comes from the witness stand.

"Mr. Shores: But, since he did say he did have some instruction, the law was read to him, we want to question him about those instructions. They are the ones who brought that out. We didn't know about

they had a little meeting and discussed what they were to do, so that is what we are trying to find out, Your Honor.

"The Court: You may ask him.

"Q. * * * were you given any instructions or any orders as to what type of signs a person must be wearing before you could make an arrest?

"A. No, I don't recall any such orders.

"Q. They didn't tell you how large the sign was to be, or how small?

"A. No, there was no mention as to size.

"Q. Well, specifically what was said at this roll call with respect to 1159?

"A. I don't remember the exact conversation. All I know they read out—they said Article 1159 will cover any demonstrations, or parades, or carrying signs downtown. They didn't mention what kind of—what the signs were to say, or what size, or what color or anything of that nature.

"Q. In other words, they gave you instructions coupled with that reading as to what it would require to make the arrest? One of the requirements was that a person must have a sign on?

[fol. 116] "A. That's right.

"Q. And that was all, and that is all you arrested them for, is that correct?

"A. That is correct."

For a case to reach here after a city arrest, it must go through two tiers of judicial proceedings: *first*, a trial before the city recorder; and, *second*, on appeal from a conviction, a trial de novo in the circuit court.

Trial in the circuit court can only be had on the city attorney's filing (unless waived) of a new complaint.

Accordingly, a case might come before the recorder without counsel for the city being aware of the prosecution in detail before trial. In the circuit court, the city's attorney, under his client's instruction, is an indispensable actor.

This pattern of enforcement exhibits a discrimination within the rule of *Yick Wo* v. *Hopkins,* supra.

IX.

There Was Insufficient Evidence to Sustain the Charge

In a city ordinance prosecution, the city must sustain its case by proof to the same degree required in case of an indictable offense, to convince the jury from the evidence beyond a reasonable doubt.

Here, we consider the proof weighed in this scale fails to show a procession which would require, under the terms of § 1159, the getting of a permit.

No evidence came in as to whether or not the pedestrians in question—fifty-two in number, about a football squad with attendants—acted as a cohesive unit as a military group would march.

[fol. 117] The City failed to show whether or not other pedestrians were run off the sidewalk, blocked either in access, process or transit. No evidence showed whether or not the group disobeyed traffic lights or officers directing crossings. There was no evidence of jaywalking or wandering onto the roadway.

Were it not for the singing and clapping[13] and some spurts of activity indicative of the appellant being a

[13] *State* v. *Hughes,* 72 N. C. 25.

puisne leader under Dr. King, in conjunction with the broad definition of "street" in the City Code as embracing the public sidewalk alongside, we might not have gone to such lengths of demonstration.

The Georgia Court of Appeals, in *Montgomery* v. *Mayor, etc., of Athens,* 105 Ga. App. 57, 123 S. E. 2d 339, where a number of men (bearing signs with slogans with scriptural citations) picketed the University of Georgia campus while the Attorney General of the United States spoke within, had this to say:

> "The undisputed facts in this case show that the petitioners did not obstruct or interfere with either vehicular traffic or pedestrian traffic and were not engaged in any activity which would require a police escort to direct traffic in conjunction therewith. Not only did they not unreasonably burden and interfere with the normal use of the streets by the public in the City of Athens but the undisputed facts show that their activity did not burden or interfere with the normal use of the streets in any manner whatsoever. We are therefore of the opinion that the activity of the petitioners on this occasion did not constitute a parade as contemplated by the ordinance or by the usually accepted definition of a parade. * * * "

Here, the trial court erred in overruling the appellant's motion to exclude the evidence for want of a prima facie case.

[fol. 118]

X.

Limitation of Opinion

When this case arose, *Cox* v. *Louisiana,* supra, was not announced. *Freedman* v. *Maryland,* supra, was waiting

in the wings. The trial judge rested on a more vigorous *Cox* v. *New Hampshire,* supra.

We emphasize that we have only before us a walking on city sidewalks. In the use of the roadway probably less stringent standards of construction would prevail against the prosecutor.

Moreover, we do not doubt the potentiality of the City's adopting an ordinance without suppressing free expression or locomotion. We quote from *Cox* v. *Louisiana,* supra, per Goldberg, J.:

"* * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, *and not susceptible to abuses of discriminatory application,* cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and

available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. * * *

* * *

"We have no occasion in this case to consider the constitutionality of the uniform, consistent, and [fol. 119] nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings. * * *" (Italics added.)

Ordered liberty is the end for which we enforce laws, not the wish for self-immolation. On the bones of the martyrs to his tyranny man has never built a lasting system of Law.

Lord Acton in 1877 perceived the interplay between rights and duties, between competing claims of rights—saying:

"* * * At all times sincere friends of freedom have been rare, and its triumphs have been due to minorities, that have prevailed by associating themselves with auxiliaries whose objects often differed from their own; and this association, which is always dangerous, has been sometimes disastrous, by giving to opponents just grounds of opposition, and by kindling dispute over the spoils in the hour of success. No obstacle has been so constant, or so difficult to overcome, as uncertainty and confusion touching the nature of true liberty. If hostile interests have wrought much injury, false ideas have wrought still more; and its advance is recorded in the increase of knowl-

edge, as much as in the improvement of laws. The history of institutions is often a history of deception and illusions; for their virtue depends on the *ideas* that produce and on the *spirit* that preserves them, and the form may remain unaltered when the substance has passed away." (Italics added.)

X.

Conclusion

The appellant had standing to question the ordinance. *Staub* v. *Baxley,* supra; *Freedman* v. *Maryland,* supra.

We consider that (1) § 1159 of the 1944 General Code of the City of Birmingham, certainly as to the use of sidewalks by pedestrians, is void for vagueness because of overbroad, and consequently meaningless, standards for the issuance of permits for processions; (2) said § 1159 has been enforced in a pattern without regard to even the meaning here claimed for by the City to such an extent as to make it unconstitutional as applied to [fol. 120] pedestrians using the sidewalks; and (3) the City failed to make a case, under the purported meaning of § 1159, of there being a need for the appellant in this case to be covered by a permit to use the sidewalk in company with others.

Therefore, the judgment below is due to be reversed and the appellant is due to be discharged sine die.

Reversed and Rendered.

Dissenting Opinion

[fol. 121]

JOHNSON, J., (dissenting)

The complaint filed in the circuit court by the City's attorney charges that appellant "did take part or participate in a parade or procession on the streets of the City without having secured a permit therefor from the commission, contrary to and in violation of Sec. 1159 of the General City Code of Birmingham of 1944."

The evidence, as introduced by the City, tended to show that during the afternoon of Friday, April 12, 1963, approximately 52 persons, most of whom were Negroes, departed from a church in the 1400 block of 6th Avenue North in Birmingham, grouped "in formation" on the sidewalk in front of the church, and then walked "in formation" along the sidewalks for several blocks. Their route followed east from the church along 6th Avenue North to 17th Street, then south along 17th Street one block to 5th Avenue North, and then east again along 5th Avenue North towards 18th Street. They were stopped by a policeman in the middle of the block between 17th and 18th Streets. "Spectators" lining the route fell in behind and followed the group in formation as they passed by. This crowd of "spectators"—consisting of several hundred persons—did not walk in formation and had no discernible organization. There were also a number of photographers present. The appellant, who is a preacher, left the church with the people who walked in formation. He was observed entering the church wearing a business suit, and when he left the church he was wearing a black shirt and "bluejean" trousers. Rev. Martin Luther King and Rev. A. B. Abernathy led the group in formation. They were dressed in attire similar to that

worn by appellant. The group in formation sang and clapped hands as they proceeded along the sidewalk, but were otherwise orderly. No permit was issued for a parade or procession to be held on April 12, 1963. There is no evidence concerning whether anyone applied for such permit.

[fol. 122] Police Officer R. N. Higginbotham, a witness for the City, was at 5th Avenue North and 18th Street when he first observed the alleged parade or procession. He testified that the group in formation turned on to 5th Avenue from 17th Street and proceeded east on the sidewalk on the north side of 5th Avenue, that this group was marching four to six abreast "all the way across the sidewalk", and that he stopped them in the middle of the block between 17th and 18th Streets. He stated that the crowd following the group in formation was in the center of the street, and also that he observed appellant in the group in formation, in the "third or fourth row back."

Police Officer Edward Ratigan, a witness for the City, testified that he followed the alleged parade or procession from the church on 6th Avenue to where it was stopped on 5th Avenue; that the group in formation consisted of 52 persons marching two abreast, approximately forty inches apart; and that this formation persisted until the group was stopped. He further stated that appellant was at no time in line with a partner in the marching group but was walking along side the group talking to them, and giving them encouragement. Police Officer Herman Evers testified that appellant was "bounding from the front to the rear" of the marching group "waving his arms to come on, telling them to come on."

Appellant's evidence consists of the testimony of five witnesses, including himself. His evidence tends to show that approximately 52 persons left the church on 6th Avenue North and walked two abreast on the sidewalks for several blocks; that appellant left the church with the group and walked a few blocks in the same direction; that he was not walking with a partner in this group but was walking at times beside the group, counseling them to be quiet and orderly; that he also tried to prevent [fol. 123] bystanders or spectators from joining the marching group; and that he left the scene before any of the group in formation was arrested. Appellant referred to the group in formation as "marchers."

Appellant contends that the court erred in overruling his motion to exclude the City's evidence because (1) there is no evidence of a parade or procession, (2) assuming arguendo there was a parade or procession, it occurred on the sidewalk and not in the streets as alleged in the complaint, and (3) there is no evidence that appellant took part or participated in such parade or procession.

The statute does not attempt to define a parade or procession. Parade is defined in Webster's New International Dictionary, Second Edition, as follows:

> "Any march or procession; esp. a formal public procession; the movement of any body marshalled in something like military order; as, a parade of firemen; a circus parade.
>
> Procession is defined in Webster's New International Dictionary, Second Edition. as follows:
>
> "A group, esp. of persons or of vehicles containing persons, moving onward in an orderly, cere-

> monious, or solemn parade; as a religious procession; to go in procession to the capitol; to form a procession."

In *Cox* v. *New Hampshire,* 312 U. S. 589, 61 S. Ct. 762, 85 L. Ed. 1049, the Supreme Court of the United States had before it the question of whether a group of fifteen to twenty members of a religious sect marching along the sidewalk in single file carrying placards constituted a "parade or procession" within the meaning of a New Hampshire Statute prohibiting a parade or procession without a license. The question was answered in the affirmative by a unanimous court. Chief Justice Hughes, speaking for the court, stated:

> "There appears to be no ground for challenging the ruling of the state court that appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: 'It was a march in formation, and its advertising and informatory purpose did not make it otherwise . . . It is immaterial that its tactics were few and simple. *It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets.*" (Emphasis added)

Here, the City's evidence establishes that a substantial number of persons, upon leaving the same church at the same time, gathered in formation in front of that [fol. 124] church and while maintaining formation marched on the sidewalks along the streets for several blocks, two to six abreast. They were singing and clapping their hands. The group was led and directed by ministers or preachers. The marchers attracted a crowd of spectators,

and some photographers. This evidence established, in my opinion, a common intent to march on the streets as an organized, collective body of persons. It was a movement of a body of persons marshalled in something like military order. It was a "parade or procession" within the meaning of Section 1159, supra.

Appellant's contention that the parade or procession did not occur in the street is without merit. A look at Section 2 of the General City Code of Birmingham of 1944 discloses an intent to treat sidewalks as part of the streets. Section 2 reads in part:

> "Sec. 2. Definitions and rules of construction.
>
> "In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise.
>
> * * *
>
> "Sidewalk: The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

In common parlance, a "sidewalk" is the part of a street assigned to the use of the pedestrians. *Smith* v. *City of Birmingham,* 42 Ala. App. 457, 168 So. 2d 35.

A parade or procession may be held on the sidewalk as well as that part of the street set aside for vehicular traffic. See *Cox* v. *New Hampshire,* supra. Sec. 1159, supra, prohibits a parade or procession on any portion of the street, including the sidewalk.

The evidence clearly establishes that appellant took part or participated in the parade or procession. If we reject the testimony of Officer Higginbotham to the effect that appellant was in the group in formation, which

I do not, the testimony of other police officers to the effect [fol. 125] that appellant walked beside the marching group giving them instructions is sufficient to establish that he participated in the parade or procession. One who assumes duties similar to a drill sergeant in a military parade, as did appellant, takes part or participates in a parade or procession.

Appellant contends that Section 1159 "vests in the commission the power to restrain free expression without establishing reasonable standards for the use of such power," and therefore violates the First Amendment to the United States Constitution, which is protected against state action by the Fourteenth Amendment.

Although the right to engage in a parade is one phase of the exercise of the fundamental right of free speech and assembly, such right is subject to reasonable and nondiscriminating regulation and limitation.

In Cox v. New Hampshire, supra, Chief Justice Hughes wrote:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintain public order without which liberity itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the

interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * * As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

[fol. 126] In *Kunz* v. *New York,* 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 28, Mr. Justice Jackson wrote that "cities throughout the country have adopted the permit requirement to control private activities on public streets and for other purposes." Ordinances of this character have been in effect in most municipalities of Alabama for many years. The authority to enact such ordinances is given by Section 455, Title 37, and Section 654, Title 62, Code of Alabama 1940.

It is the duty of this Court not to strike down a city ordinance as unconstitutional if by a reasonable construction it can be given a field of operation within constitutional limits. See *City of Mobile* v. *Coffin,* 28 Ala. App. 243, 181 So. 795. Where an ordinance is susceptible of two constructions, one of which will defeat the ordinance and the other will support it, the latter construction will be adopted. *Birmingham Ry., Light & Power Co.* v. *Kyser,* 203 Ala. 121, 82 So. 151. "A municipal ordinance must be construed with a view towards the purpose for which it was adopted. *City of Birmingham* v. *Mauzey,* 214 Ala. 476, 108 So. 382.

Dissenting Opinion

I think it is obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organized formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions. Thus, the required information is related to [fol. 127] the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

Section 1159, supra, provides that the Commission shall issue a permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied

is obvious from the purpose of the ordinance. It would be of little or no value to state that the standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly [fol. 128] disturbed.

My conclusions are fully sustained by the decision in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508. In that case the court was called upon to determine the constitutionality of a state statute prohibiting a parade or procession on the streets without a permit from local authorities. The statute did not set out a standard for granting or refusing the permit. The court overruled the defendant's contention that the statute vested unfettered control in the licensing authorities. In answering this contention, the court said:

> "The act is implicit in its requirement that the licensing authority act reasonably in granting or deny-

ing licenses, and with reference to the object of public order on the public ways. If it does not in express terms 'make comfort or convenience in the use of streets * * * the standard of official action' (Hague v. Committee for Industrial Organization, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423) the necessary inference is that it does, based upon the presumption in favor of the validity of legislation as reinforced by the express provision of the act bestowing 'delegated powers' upon the authority, as a grant intended to be only of due legislative power which may properly be delegated. The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has, and the legislature attempted to delegate no power it did not possess."

The United States Supreme Court, in a unanimous decision, held that the statute, as construed by the Supreme Court of New Hampshire, violated no federal constitutional rights of the defendants. *Cox* v. *New Hampshire,* supra.

The construction adopted by the Supreme Court of New Hampshire is sound. I would place the same construction upon the ordinance here for review.

There is nothing in the record before us tending to show that the ordinance has been applied in other than a fair and non-discriminatory manner. I cannot agree that [fol. 129] this case, coupled with *Primm* v. *City of Birmingham*, —— Ala. App. ——, 177 So. 2d 236, and the two cases decided on authority of Primm constitutes a pattern of enforcement. No violation of *Yick Wo* v. *Hopkins*, 118 U. S. 356, has been argued, nor does such violation appear from the record or extrinsically.

So evanescent are the issues in the majority opinion, I most respectfully dissent.

[fol. 130]

Judgment

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1965-66

6 Div. 979

Fred L. Shuttlesworth

v.

City of Birmingham

Appeal from Jefferson Circuit Court

October 3, 1963	CERTIFICATE FILED
December 26, 1963	TRANSCRIPT FILED
February 27, 1964	COME THE PARTIES BY ATTORNEYS, AND SUBMIT THIS CAUSE ON BRIEFS FOR DECISION.

(JUDGMENT)

November 2, 1965

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on brief and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court, there is manifest error. It is therefore considered that the judgment of the Circuit Court be reversed and annulled, and judgment rendered, discharging appellant. (Johnson. J., dissents.)

[fol. 1]

PROCEEDINGS IN THE SUPREME COURT OF ALABAMA

IN THE

SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. 291

CITY OF BIRMINGHAM, a Municipal Corporation,

Petitioner,

vs.

FRED L. SHUTTLESWORTH,

Respondent.

Petition for Certiorari to Court of Appeals

(Filed January 5, 1966)

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Your petitioner, the City of Birmingham, a municipal corporation, hereby respectfully petitions this Honorable Court to review and determine the decision rendered by the Court of Appeals of Alabama on the 2nd day of November, 1965, in that certain appeal in that Court numbered and styled #979 Division 6, Fred L. Shuttlesworth, Appellant v. City of Birmingham, Appellee, on appeal from the Circuit Court of the Tenth Judicial Circuit of Alabama.

[fol. 2] Petitioner avers that it has duly filed its application for rehearing in said Court of Appeals in said cause within the time required by law and raising the points hereinafter set forth, and that said application for rehearing has been decided adversely to the movant by said Court of Appeals on the 21st day of December, 1965.

Your petitioner respectfully shows unto the Court that this cause is a prosecution by the appellee against the appellant for the violation of Section 1159 of the General City Code of Birmingham, Alabama, of 1944 which reads as follows:

> "It shall be unlawful to organize or hold or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
>
> To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals, which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be re-

fused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions."

The Court submitted the case to the jury and the jury returned a verdict in favor of the appellee and judgment was entered accordingly; that the points of law involved which petitioner claims should be reviewed and revised by this Supreme Court are as follows:

[fol. 3] 1. Wherein, the Court of Appeals held that Section 1159 of the General Code of Birmingham of 1944 imposed an invidious prior restraint on a facet of free speech.

2. Wherein, the Court of Appeals held that Section 1159 of the General Code of Birmingham of 1944 lacks ascertainable standards for the issuance of a parade permit.

3. Wherein, the Court of Appeals held that Section 1159 of the General Code of Birmingham of 1944 has been applied in a pattern of discrimination within the rule of *Yick Wo* v. *Hopkins,* 118 US 356, 6 S. Ct. 1064, and therefore is void as applied.

4. Wherein, the Court of Appeals held that the evidence (as set out in its opinion) was insufficient to sustain a conviction for the violation of Section 1159 of the General Code of Birmingham of 1944.

5. Wherein, the Court of Appeals held that appellant had standing to question the validity of Section 1159 of the General Code of Birmingham of 1944.

Wherefore, your petitioner most respectfully requests that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said court to certify and send to this Court on a day certain to be designated by this court, a full and complete transcript of the record and all proceedings of said Court of Appeals of Alabama, in the cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of, and to reverse the judgment of the Court of Appeals, or render such judgment as said Court should have rendered. [fol. 4] Petitioner requests that this Honorable Court suggest and require the Court of Appeals to stay or recall its certificate of judgment of reversal of said cause pending the determination of this petition and decision by this Honorable Court in said petition.

Submitted herewith is a brief and argument in support of this petition.

Respectfully submitted,

/s/ WILLIAM C. WALKER
Attorney for Petitioner,
City of Birmingham

CERTIFICATE

This is to certify that a copy of the foregoing Petition for Certiorari was served on Jack Greenberg, Norman C. Amaker and Frank H. Heffron, Attorneys for Appellant, by depositing same in the United States Mail, postage prepaid, addressed to them at 10 Columbus Circle, New York, New York, 10019; and a copy of same was served upon Arthur Shores and Orzell Billingsley, Jr., at their offices in the A. G. Gaston Building and at 1630 Fourth Avenue North, respectively, in the City of Birmingham, Alabama, this 4 day of January, 1966.

/s/ WILLIAM C. WALKER
Attorney for Appellee,
City of Birmingham

[fol. 5]

Order Granting Writ

JANUARY 20, 1966

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

6th Div. 291

Ex parte: City of Birmingham.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS
(Re: Fred L. Shuttlesworth v. City of Birmingham)

Upon a preliminary examination of the Petition for Writ of Certiorari to the Court of Appeals, this Court concluding there is probability of merit in the Petition and that the Writ should issue,

HEREBY ORDERS that the Writ issue, and the cause shall stand for resubmission on briefs or oral argument, if so desired, as provided by Revised Supreme Court Rule 39.

[fol. 6]

Opinion

FILED
NOVEMBER 9, 1967
Supreme Court of Alabama
J. O. SENTELL
Deputy Clerk

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

6th Div. 291

Ex parte City of Birmingham

In re Fred L. Shuttlesworth

v.

City of Birmingham

Petition for Certiorari to Court of Appeals

LAWSON, JUSTICE.

Fred L. Shuttlesworth was convicted in the Recorder's Court of the City of Birmingham of parading without a [fol. 7] permit in violation of § 1159 of the General City Code of Birmingham, hereinafter referred to as § 1159, which reads:

> "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other

public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

[fol. 8] "The two preceding paragraphs, however, shall not apply to funeral processions."

The word "commission" as used in § 1159 refers to the governing body of the City of Birmingham.

Following his conviction in the Recorder's Court, Shuttlesworth appealed to the Circuit Court of Jefferson County, where there was a de novo trial before a jury. The jury found Shuttlesworth guilty and the trial court, after rendering a judgment in accordance with the verdict of the jury, sentenced Shuttlesworth to pay a fine of $75 and to perform ninety days hard labor for the City of Birmingham.

Shuttlesworth then appealed to the Court of Appeals of Alabama which court, in a two-to-one decision, reversed the judgment of the Circuit Court of Jefferson County and rendered a judgment discharging Shuttlesworth "sine die." Judge Cates wrote the majority opinion, in which Presiding Judge Price concurred. Judge Johnson dissented.—*Shuttlesworth* v. *City of Birmingham,* 43 Ala. App. 68, 180 So. 2d 114.

The City of Birmingham filed petition in this court for a writ of certiorari to review and revise the opinion and judgment of the Court of Appeals. We granted the writ.

While we are not altogether certain as to the exact reasons why the majority of the Court of Appeals concluded that Shuttlesworth's conviction should be reversed and that he should be discharged sine die, we will treat [fol. 9] that opinion as holding that § 1159 is void on its face because of overbroad and consequently meaningless standards for the issuance of permits for parades or processions; that said section has been enforced by the City of Birmingham in such a way as to make it unconstitutional under the holding of the Supreme Court of the United States in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; that the evidence adduced by the City of Birmingham in the trial in the circuit court was insufficient to present a jury question as to whether Shuttlesworth had, in fact, been engaged in a parade, procession or other public demonstration in the streets orother public ways of the City of Birmingham without first having obtained a permit as required by § 1159.

In view of the fact that there was a dissenting opinion, we have gone to the original record to determine the facts.

Opinion

The majority opinion of the Court of Appeals does not contain a complete statement of the facts. However, the dissenting opinion of Judge Johnson contains a rather lengthy recitation of the facts and our examination of the original record shows that the facts as stated in the dissenting opinion are fully supported by the record.

The dissenting opinion, unlike the majority opinion of the Court of Appeals, takes cognizance of the rule so often stated by the appellate courts of this state, to the [fol. 10] effect that it is the duty of courts not to strike down a city ordinance or a statute as unconstitutional, if by reasonable construction it can be given a field of operation within constitutional limits and that where a statute or ordinance is susceptible of two constructions, one of which will defeat the ordinance or statute and the other will uphold it, the latter construction will be adopted.

With that rule in mind, Judge Johnson proceeds to construe § 1159, saying:

> "I think it is obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organize [sic] formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting municipal authorities in deciding whether or not the issuance of a permit is consistent with

traffic conditions. Thus, the required information is [fol. 11] related to the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

"Section 1159, supra, provides that the Commission shall issue a permit 'unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.' I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied is obvious from the purpose of the ordinance. It would be of little or no value to state that the [fol. 12] standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what

is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed." (180 So. 2d, 144)

We agree with and adopt the construction which Judge Johnson has placed on § 1159 and we agree with his observations to the effect that such construction finds [fol. 13] support in the case of *State* v. *Cox,* 91 N. H. 137, 16 Atl. 2d 508, which case was affirmed, in a unanimous decision, by the United States Supreme Court.—*Cox* v. *State of New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049.

The New Hampshire Supreme Court, as is pointed out in Judge Johnson's dissenting opinion, was called upon to determine the constitutionality of a state statute prohibiting, among other things, a parade or procession on the streets without a permit from local authorities. The New Hampshire statute did not set out a standard for granting or refusing the permit. The language of the New Hampshire court answering the assertion that the statute under consideration vested unwarranted control in the licensing authorities is quoted in Judge Johnson's opinion and will not be repeated here.

In the New Hampshire case, the marchers were divided into four or five groups, each composed of about fifteen to

twenty persons. Each group proceeded to a different part of the business district of the City of Manchester and then lined up in a single-file formation and marched along sidewalks of the city in such a formation. The marchers carried banners and distributed leaflets announcing a meeting to be held at a later time where a talk on government would be given to the public free of charge. The marchers had no permit. Despite that fact that the marchers were [fol. 14] carrying banners and distributing leaflets as well as marching, their conviction of parading without a permit was affirmed by the Supreme Court of New Hampshire.—*State* v. *Cox, supra.*

In affirming the judgment of the Supreme Court of New Hampshire, the Supreme Court of the United States in *Cox* v. *New Hampshire, supra,* said in part as follows:

> "The sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a 'parade or procession' upon a public street is not here involved and the question of the validity of an ordinance addressed to any other sort of conduct than that complained of is not before us.
>
> "There appears to be no ground for challenging the ruling of the state court that appellants were [fol. 15] in fact engaged in a parade or procession upon the public streets. As the state court observed:

'It was a march in formation, and its advertising and informatory purpose did not make it otherwise. . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets.'

* * *

"If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right." (312 U. S., 573-576)

We would like to point out that we do not construe § 1159 as conferring upon the "commission" of the City [fol. 16] of Birmingham the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. See *Edwards* v. *South Carolina*, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697.

We also hold that under § 1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just

order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.

Since the Court of Appeals of Alabama rendered its decision and judgment in the case here under review, the Supreme Court of the United States rendered a decision in a case wherein § 1159 was involved. See *Wyatt Tee Walker* v. *City of Birmingham,* decided by the Supreme Court of the United States on June 12, 1967, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——. Application for rehearing was denied on October 9, 1967. The [fol. 17] Walker case, *supra,* was in the Supreme Court of the United States on writ of certiorari to review the opinion and judgment of this court in the case of *Walker et al.* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 493, wherein we affirmed the conviction of Walker and several others, including Shuttlesworth, of criminal contempt for violating a temporary injunction issued by the Circuit Court of Jefferson County, in Equity, which enjoined Walker, Shuttlesworth and others from engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or mass demonstrations without a permit. The injunction enjoined the respondents from carrying on other activities which we do not think necessary to comment on here. In our case of *Walker et al.* v. *City of Birmingham,* 279 Ala. 53. 181 So. 2d 493, we did not expressly pass on the constitutionality of § 1159, although the petitioners, that is, Walker, Shuttlesworth and others, asserted that said § 1159 is void because it violates the First and Fourteenth Amendment to the Constitution of

the United States. Based on that premise, the said petitioners also argued that the temporary injunction was void as a prior restraint on the constitutionally protected rights of freedom of speech and of assembly.

Our affirmance of the criminal contempt convictions was based on the principle "that the circuit court had the duty and authority, in the first instance, to determine the [fol. 18] validity of the ordinance, and, until the decision of the circuit court is reversed for error by orderly review, either by the circuit court or a higher court, the orders of the circuit court based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be punished. Howat v. State of Kansas, 258 U. S. 181, 42 S. Ct. 297, 66 L. Ed. 550."

As we have heretofore indicated, the Supreme Court of the United States on June 12, 1967, affirmed our judgment in *Walker et al.* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 483. The Supreme Court of the United States divided five to four. It appears from the Court's opinion, written by Mr. Justice Stewart, and from the opinions of the dissenting Justices, that the petitioners in the Supreme Court of the United States again asserted that § 1159 was void on its face. The dissenting Justices expressed the view that § 1159 is unconstitutional on its face.

However, the majority of the Court, as then constituted, did not hold that § 1159 is void on its face. The Court's opinion contains the following language:

> "The generality of the language contained in the Birmingham parade ordinance [§1159] upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of

[fol. 19] its provisions. Schneider v. State, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Kunz v. People of State of New York, 34 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280. The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire Courts in Cox. v. New Hampshire [312 U. S. 579, 71 S. Ct. 762, 85 L. Ed. 1049] and Poulos v. New Hampshire [345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105], both supra. Cf. Shuttlesworth v. City of Birmingham, 382 U. S. 87, 91, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176; City of Darlington v. Stanley, 239 S. C. 139, 122 S. E. 2d 207. *Here, just as in Cox and Poulos, it could not be assumed that the ordinance was void on its face.*" (Emphasis supplied) (87 S. Ct., 1830)

The language which we have just italicized seems to us to be in direct conflict with the conclusion reached in the [fol. 20] majority opinion of the Court of Appeals of Alabama here under review.

We are of the opinion that the construction which Judge Johnson placed on § 1159 in his dissenting opinion, which we have in effect adopted, together with the construction which we have placed on § 1159 in this opinion, requires a reversal of the judgment of the Court of Appeals here under review.—*Cox* v. *New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; *Walker et al.*

v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——.

We hold that § 1159 is not void on its face and that under the construction which we have placed on that section, it did not deprive Shuttlesworth of any right guaranteed to him under the First and Fourteenth Amendments to the Constitution of the United States.

We are also in accord with the conclusion reached by Judge Johnson in his dissenting opinion to the effect that there is nothing in the record before us tending to show that § 1159 has been applied in other than a fair and non-discriminatory fashion. The record before us shows no violation of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

The petitioners in the case of *Wyatt Tee Walker et al.* v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——, decided by the Supreme Court of [fol. 21] the United States on June 12, 1967, asserted that they were free to disobey the injunction because § 1159, on which the injunction was based, had been administered in an arbitrary and discriminatory fashion. In support of that contention those petitioners had sought to introduce evidence in the trial court to the effect that a few days before the injunction issued requests for permits to picket had been made to a member of the City Commission and one request had been rudely refused and that this same official had later made it clear that he was without power to grant the permit alone, since the issuance of permits was the responsibility of the entire Commission. The Supreme Court of the United States, in answering that contention, said as follows: "Assuming the truth of the proffered evidence, it does not follow that the parade ordinance is void on its face."

We see no occasion to deal at length with the holding or observation contained in the majority opinion of the Court of Appeals of Alabama to the effect that the evidence was insufficient to show that Shuttlesworth had engaged in a parade on the "streets or other public ways of the City of Birmingham without a permit." The evidence as delineated in the dissenting opinion of Judge Johnson, in our opinion, clearly shows that such a violation occurred.

We can see no merit in the position apparently taken in the majority opinion of the Court of Appeals of Alabama [fol. 22] to the effect that since the marchers paraded on the sidewalks of the City of Birmingham rather than in the streets, there had been no violation of said § 1159.

Section 2 of the General City Code of Birmingham of 1944 reads in part:

> "Sec. 2. Definitions and rules of construction.
>
> "In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise.
>
> * * *
>
> "Sidewalk: The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

It is appropriate to note that the statute under consideration in the case of *State* v. *Cox*, 91 N. H. 137, 16 Atl. 2d 508, prohibited a parade or procession on streets without a permit from local authorities. The parade or procession in which Cox was involved occurred on the sidewalks of the city of Manchester. Neither the Supreme

Court of New Hampshire nor the Supreme Court of the United States took the position that the statute involved did not apply to sidewalks as well as to the portion of the street generally used by vehicular traffic. Cox's [fol. 23] conviction of parading without a permit was upheld by the courts.

We are aware of the fact that ordinances somewhat similar to § 1159 have been declared unconstitutional in two recent federal cases. See *Gayat* v. *Pierce* (U. S. Court of Appeals, 5th Circuit), 372 F. 2d 658; *Baker et al.* v. *Binder,* decided in the United States District Court for the Western District of Kentucky at Louisville. That was a three-judge court, with one judge dissenting. No reference was made in the opinions delivered in those cases to *Walker et al.* v. *City of Birmingham,* 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——. Perhaps we have placed too much reliance on *Walker et al.* v. *City of Birmingham,* 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——, and on *Cox* v. *New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049. We may have misinterpreted the opinions in these cases. If so, we will no doubt be set straight.

In view of the foregoing, the judgment of the Court of Appeals is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

Livingston, C. J., Goodwyn, Merrill, Coleman and Harwood, JJ., concur.

[fol. 25]

Judgment

NOVEMBER 9, 1967
THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1967-68

6th Div. 291
C/A 6th Div. 979

Ex parte: City of Birmingham,
a Municipal Corporation

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS
(Re: Fred L. Shuttlesworth v. City of Birmingham)

WHEREAS, on January 20, 1966, the Writ of Certiorari to the Court of Appeals was granted, and said cause was set down for submission on briefs or oral argument; WHEREUPON,

Comes the petitioner, by its attorney, and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Court of Appeals there is manifest error.

IT IS THEREFORE ORDERED AND ADJUDGED that the judgment of the Court of Appeals be reversed and annulled and the cause remanded to said Court for further proceedings therein.

IT IS FURTHER ORDERED AND ADJUDGED that the costs incident to this proceeding be taxed against the respondent, Fred L. Shuttlesworth, for which costs let execution issue.

Judgment

I, J. O. Sentell, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 9 day of November, 1967.

/s/ J. O. SENTELL
Deputy Clerk Supreme Court of Alabama

[fol. 26]

Application for Stay

IN THE

SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. .....

FRED L. SHUTTLESWORTH,

Petitioner,

vs.

THE CITY OF BIRMINGHAM,
A MUNICIPAL CORPORATION OF THE STATE OF ALABAMA,

Respondent.

APPLICATION FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT AND SENTENCE

By virtue of Section 2101(b) of Title 28, U.S.C.A. Petitioner, Fred D. Shuttlesworth, in the above styled cause, respectfully makes application to your Honor: (a) To stay the execution and enforcement of the Judgment of this Court for ninety (90) days from the —— day of November, 1967, and (b) To recall from the Court of Appeals of Alabama, the certificate reversing and remanding the Judgment of that Court, to enable the petitioner to apply for and obtain, if he can, a review of said cause by the Supreme Court of the United States.

Petitioner further prays that execution and enforcement of said Judgment be stayed until the Supreme Court of the United States renders a final decision on the Petition for Certiorari, and if the same be granted,

until the Supreme Court of the United States shall render its final decision, affirming or reversing the aforesaid Judgment of the Supreme Court of Alabama.

In support of this application, petitioner shows unto Your Honors the following facts:

(1) Petitioner was tried and convicted of violation of Ordinance 1159 of the General City Code of Birmingham. Petitioner was sentenced to a term of ninety (90) days hard labor for the City of Birmingham, and a fine of Seventy-five ($75.00) Dollars.

[fol. 27] 2. Your petitioner appealed to the Court of Appeals of Alabama, which Court reversed the Judgment of the Circuit Court of Jefferson County, and rendered a Judgment discharging petitioner.

3. The City of Birmingham filed a Petition in this Court for Writ of Certiorari, to review and revise the Opinion and Judgment of the Court of Appeals, which Writ was granted.

4. Petitioner, both in the pleadings filed below, and on the trial of this cause, and in the petition for Certiorari in this Court, have raised several important questions of federal constitutional law, arising under the First and Fourteenth Amendments to the United States Constitution, but were decided adversely for petitioner.

5. That on final submission to this court the decision and judgment of the Court of Appeals of Alabama were reversed and rendered on November 9, 1967.

6. The Counsel for petitioner has informed him that several important questions of Federal Constitutional Law

were raised on his trial, and on application for Certiorari, to this Honorable Court, and petitioner has instructed counsel to seek a review of this cause by the United States Supreme Court. Counsel for petitioner is preparing an application for Writ of Certiorari to be filed in the United States Supreme Court, in order that the said Court may review said questions of Federal Constitutional Law, but that said petition and the record in this cause canot be prepared before this Honorable Court would otherwise issue its certificate of affirmance, and petitioner would be apprehended, fined and imprisoned, and that petitioner should not be fined and imprisoned before the Supreme Court of the United States has an opportunity to act on his petition for Writ of Certiorari.

7. Truth of the matters set out above, and the good faith of petitioner, in his avowal to seek review of this cause by the Supreme Court of the United States of America, is verified by the Affidavit of Counsel for petitioner.

ARTHUR D. SHORES
1527 Fifth Avenue, North
Birmingham, Alabama

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

[fol. 28]

NORMAN C. AMAKER
JACK GREENBERG
10 Columbus Circle
New York, New York

By /s/ ARTHUR D. SHORES
Attorneys for Petitioner

VERIFICATION

STATE OF ALABAMA
JEFFERSON COUNTY

Personally appeared before me the undersigned authority for and in the said County and State, Arthur D. Shores, who is known to me, and who after being first duly sworn, says that he is counsel for the petitioner, in the above petition, and that the facts set forth therein are true to the best of his knowledge, information and belief, and that the above petition is filed for the purposes set forth therein, and not for the purpose of delay or harassment.

/s/ ARTHUR D. SHORES

Sworn to and subscribed before me
this 22nd day of November, 1967.

/s/ AGNES N. STUDEMIRE

NOTARY PUBLIC

[fol. 29]

Order Granting Stay

December 4, 1967

STATE OF ALABAMA ..... JUDICIAL DEPARTMENT

SUPREME COURT OF ALABAMA

OCTOBER TERM 1967-68

6th Div. 291

Ex Parte: City of Birmingham, a Municipal Corporation

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS
(Re: Fred L. Shuttlesworth v. City of Birmingham)

Jefferson Circuit Court

The respondent, Fred L. Shuttlesworth, in the above styled cause, having made application for suspension of sentence and said application being duly examined and understood by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Certificate of Reversal and Remandment to the Court of Appeals be recalled by the Clerk of the Supreme of Alabama.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the execution of the judgment of reversal is hereby stayed for ninety (90) days from the 4th day of December, 1967 to enable the respondent to apply for and obtain, if he can, a review of said cause by the Supreme Court of the United States.

[fol. 30] In the event the respondent does not apply to the Supreme Court of the United States for a Writ of Certiorari within ninety (90) days from the 4th day of December, 1967, the stay of execution of said judgment of reversal shall cease and terminate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the execution and enforcement of said judgment be further stayed in the event the respondent files a Petition for Certiorari in the Supreme Court of the United States to review said judgment of reversal and until the Supreme Court of the United States renders a final decision affirming or reversing the judgment of this Court.

I, J. O. Sentell, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 4 day of Dec. 1967.

/s/ J. O. Sentell

Deputy Clerk Supreme Court of Alabama

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SUPREME COURT, U. S.

MAR 7 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 42

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Decide Whether the Court Below Misapplied This Court's Decisions in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967), and *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), so as to Bring Them Into Conflict With *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Staub* v. *Baxley*, 355 U. S. 313 (1958) 11

II. Certiorari Should Be Granted to Decide Whether the Decision Below Conflicts With *Bouie* v. *Columbia*, 378 U. S. 347 (1964), Because Petitioner Was Given No Fair Warning That He Was Required to Secure a Parade Permit A) Because Prior Decisions of This Court Taught Petitioner That He Need Not Submit to a Permit Ordinance Patently Unconstitutional on Its Face

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner Fred L. Shuttlesworth prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama, entered in the above-entitled cause on November 9, 1967.

Opinions Below

The opinion of the Supreme Court of Alabama is reported at 206 So. 2d 348. The opinion and judgment of the Supreme Court of Alabama are set forth, Appendix, pp. 1a-16a, *infra*. The opinions in the Court of Appeals of Alabama, Sixth Division, are at 43 Ala. App. 68, 180 So. 2d 114 (1965), Appendix, pp. 17a-80a, *infra*.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered November 9, 1967 (R. II, 24).[1] On January 27, 1968, Mr. Justice Black extended the time in which to file this petition for writ of certiorari to and including March 8, 1968.

Jurisdiction of the Court is invoked pursuant to 28 U. S. C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Petitioner was convicted of parading without a permit, in violation of the Birmingham parade ordinance. Petitioner had ignored the permit requirement because its grant of overbroad discretionary licensing power rendered it patently offensive to the First and Fourteenth Amendments and because there were no Alabama procedures for effective and timely administrative decision-making and judicial review. On appeal, after the Alabama Court of Appeals had declared the ordinance unconstitutional on its face and reversed petitioner's conviction, the Supreme Court of Alabama purported to excise the constitutionally offensive portions of the ordinance, retroactively validated it and affirmed petitioner's conviction. Under these circumstances, was petitioner denied due process of law?

---

[1] The record is in two volumes, herein designated as R. I (containing the proceedings in the Court of Appeals of Alabama) and R. II (containing the proceedings in the Supreme Court of Alabama).

2. Did the application of the Birmingham parade ordinance to petitioner deny him due process of law because it provided him no fair notice that he was required to secure a parade permit:

a) Because prior decisions of this Court taught petitioner that he need not submit to a permit ordinance patently offensive to the First and Fourteenth Amendments which could not be saved short of repeal; and,

b) Because he had no fair notice that his participation in a peaceful, orderly and nonobstructive walk along the sidewalks of Birmingham would be held to constitute a parade?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following ordinance of the City of Birmingham, a municipal corporation of the State of Alabama:

GENERAL CODE OF CITY OF BIRMINGHAM, ALABAMA (1944), § 1159

It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable

number of persons; vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

Statement of the Case

This case tests the right of citizens of Birmingham, Alabama to stand on, or walk along, the public sidewalks of that city in a peaceful, orderly and nonobstructive manner.[2]

Petitioner Fred L. Shuttlesworth, a Negro minister, is a "'notorious' person in the field of civil rights in Birmingham."[3] Toward such a notorious person, "[t]he attitude

[2] Recently, in *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965), the Court struck down petitioner Shuttlesworth's conviction under another Birmingham city ordinance which, literally read, said that "a person can stand on a public sidewalk in Birmingham only at the whim of any police officer of that city" (382 U. S. at 90).

[3] *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, 102 (1965) (concurring opinion of Fortas, *J.*).

of the city administration in general and of its Police Commissioner in particular are a matter of public record, of course, and are familiar to this Court from previous litigation. See *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963); *Gober* v. *City of Birmingham*, 373 U. S. 374 (1963); *In re Shuttlesworth*, 369 U. S. 35 (1962)."[4]

Petitioner Shuttlesworth seeks review of his conviction for taking part in a peaceful protest demonstration in Birmingham on Good Friday, April 12, 1963—a time "when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought."[5] Trials of approximately 1500 other demonstrators, charged, like petitioner, only under the Birmingham parade ordinance, are pending the outcome of this case.

Good Friday was a pivotal day in the historic civil rights campaign of petitioner Shuttlesworth and others involved in the movement of that period. At about noon, a crowd began to gather in a church in the 1400 block of Sixth Avenue (R. I, 67). Police officers were stationed outside to watch for signs of a demonstration (R. I, 35, 43, 48). A large number of photographers (R. I, 53) and onlookers gathered (R. I, 45).

At about 2:15 p.m., 52 persons emerged from the church (R. I, 41, 44-45). They formed up in pairs on the side-

[4] *Walker* v. *City of Birmingham*, 388 U. S. 307, 325, n. 1 (1967) (dissenting opinion of Warren, *C.J.*).

[5] *Walker* v. *City of Birmingham*, 388 U. S. 307, 338-39 (1967) (dissenting opinion of Brennan, *J.*).

walk and began to walk in a peaceful, orderly and non-obstructive way toward City Hall (R. I, 35, 37, 39, 41, 44-46, 62-63, 65, 67).[6] They walked about forty inches apart, carried no signs or placards and observed all traffic lights (R. I, 37, 39). At times they sang (R. I, 26, 35, 55).

Petitioner was not paired off; he was at times observed near various points of the column, but at other times he was not near the column at all (R. I, 25-26, 37, 39-40, 46-48, 54-55, 61-62, 64-68, 70-71).

The walk proceeded about four blocks—to the 1700 block of Fifth Avenue—where all the participants were arrested (R. 25, 38, 45). The whole episode took 15 to 30 minutes (R. I, 28). Petitioner was arrested some two hours later at his motel (R. I, 71-72).

There was no evidence that petitioner had applied for a parade permit. The parade permit book, a clerk in the city Clerk's office testified, contained no parade permit for Good Friday (R. I, 31). The clerk testified that she had never noticed—or issued a permit for—a "parade" on the sidewalks of Birmingham (R. I, 33). For example, it was not the practice to issue permits for a group of Boy Scouts forming up to board a bus (R. I, 33). The practice *was* to issue permits for parades in the streets, having bands and vehicles (R. I, 33). The following exchange occurred (R. I, 33):

> Q. Mrs. Naugher, I believe you said you have been clerk for seventeen years. A. Yes.

---

[6] One police officer testified the group was 4 to 6 abreast (R. I, 23-24), but, in the context of his and other police officers' testimony (R. I, 40-41, 44-46, 56), it is clear that the Alabama Court of Appeals was correct in concluding that this "bunching up coincided with the promenaders being blocked by officers parking police cars athwart the crossing" where they were arrested (R. I, 83).

Q. You have seen a number of these parades, haven't you? A. Yes.

Q. Have you noticed a parade down the streets or on the sidewalk? A. In the streets.

Q. All in the street? A. Yes.

Q. And did you notice whether or not these parades would have bands or vehicles in the procession? A. Yes.

Q. They would? A. Yes.

Q. And does one get a permit to picket, or just to parade? A. No.

Q. Does one get a permit to just walk down the street? A. No.

Q. Do you know whether or not at time when a group of Boy Scouts or Girl Scouts were going to load up on the bus, whether or not they would have to get a permit to get to the bus?

The Court: That would be a legal question and she wouldn't be competent.

Mr. Billingsley: The vital question is whether or not—what she has in the book there.

A. We have not issued any.

The complaint against petitioner charged that he "did take part or participate in a parade or procession on the streets of the City without having secured a permit therefor from the commission, contrary to and in violation of Section 1159 of the General City Code of Birmingham" (R. I, 3).

October 1, 1963, petitioner was tried before a jury in the Circuit Court of the Tenth Judicial Circuit, convicted and sentenced to 90 days hard labor and an additional 48 days

hard labor for failure to pay the fine of $75.00 and costs of $28.00 (R. I, 9-10).[7]

November 2, 1965, the Court of Appeals of Alabama, Sixth Division, reversed petitioner's conviction, holding (R. I, 119-20; App., pp. 69a-70a, *infra*, 180 So. 2d 114, 140-41):

> (1) § 1159 of the 1944 General Code of the City of Birmingham, certainly as to the use of sidewalks by pedestrians, is void for vagueness because of overbroad, and consequently meaningless, standards for the issuance of permits for processions; (2) said § 1159 has been enforced in a pattern without regard to even the meaning here claimed for by the City to such an extent as to make it unconstitutional as applied to pedestrians using the sidewalks; and (3) the City failed to make a case, under the purported meaning of § 1159, of there being a need for the appellant in this case to be covered by a permit to use the sidewalk in company with others.

November 9, 1967, the Supreme Court of Alabama reversed the Court of Appeals, rejecting all three bases of that court's decision (R. II, 6-23; App., pp. 1a-14a, *infra*). The Supreme Court held that § 1159 was not void on its face (R. II, 20; App., p. 11a, *infra*), that § 1159 had not been unconstitutionally applied to petitioner (R. II, 20; App., p. 11a, *infra*) and that there was sufficient evidence

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[7] Earlier, on May 15, 1963, petitioner was tried and convicted in the Recorder's Court of the City of Birmingham and sentenced to 180 days hard labor and a fine of $100.00 (R. I, 2). From this judgment, petitioner took an appeal to the Circuit Court for trial *de novo*.

of petitioner's violation of § 1159 (R. II, 21; App., p. 12a, *infra*).

The Court based its holding upon this Court's decisions in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967) and *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (R. II, 19-20; App., pp. 11a-14a, *infra*). The Court held that *Walker* and *Cox* required reversal of the Court of Appeals' voiding of the Birmingham parade ordinance, notwithstanding this Court had explicitly refused to rule on the ordinance's validity (388 U. S. at 316-17). The Court conceded that its reliance upon *Walker* and *Cox* might be misplaced,[8] but concluded (R. II; 23; App., pp. 13a-14a, *infra*): "If so, we will no doubt be set straight."[9]

How the Federal Questions Were Raised and Decided Below

In the circuit court, petitioner raised the federal questions presented here by demurrer (R. I, 4-5), by motion to exclude the testimony and for judgment (R. I, 8, 59-60) and motion for new trial (R. I, 12-14). All these motions were overruled (R. I, 18, 60, 11).

The Court of Appeals of Alabama treated petitioner's assignment of errors (R. I, 80) as presenting the following three questions for decision (R. I, 82; App., p. 18a, *infra;* 180 So. 2d at 116):

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[8] "Perhaps we have placed too much reliance on *Walker* v. *City of Birmingham*, 388 U. S. 307 and on *Cox* v. *New Hampshire*, 312 U. S. 569. We may have misinterpreted the opinions in these cases" (R. II, 23; App., pp. 13a-14a, *infra*).

[9] On December 4, 1967, the Supreme Court of Alabama entered a stay pending certiorari (R. II, 29-30).

(1) Whether § 1159, *supra,* denies, on its face, due process of law; (2) whether or not the ordinance as applied violates *Yick Wo* v. *Hopkins,* 118 U. S. 356; and (3) the sufficiency of the evidence.

These issues were resolved favorably to petitioner (R. I, 81-120; App., pp. 17a-70a, *infra;* 180 So. 2d 114-41), one Judge dissenting (R. I, 121-29; App., pp. 70a-80a; 180 So. 2d 141-45).

The Supreme Court of Alabama stated the federal questions presented in the following terms (R. II, 9; App., p. 3a, *infra*): 1) Whether "§ 1159 is void on its face because of overbroad and consequently meaningless standards for the issuance of permits for parades or processions"; 2) Whether § 1159 "has been enforced by the City of Birmingham in such a way as to make it unconstitutional"; and 3) Whether "the evidence adduced by the City of Birmingham in the trial in the circuit court was insufficient to present a jury question as to whether Shuttlesworth had, in fact, been engaged in a parade, procession or other public demonstration in the streets or other public ways of the City of Birmingham without first having obtained a permit as required by § 1159."

All these issues were resolved adversely to petitioner on federal constitutional grounds (R. II, 6-23; App., pp. 1a-14a, *infra*).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Decide Whether the Court Below Misapplied This Court's Decisions in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967), and *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), so as to Bring Them Into Conflict With *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Staub* v. *Baxley*, 355 U. S. 313 (1958).

In rejecting petitioner's claim that the Birmingham parade ordinance, § 1159 of the General City Code of Birmingham, was unconstitutional on its face, the court below placed great reliance upon this Court's decision in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967).[10] Quoting a phrase in the *Walker* opinion to the effect that "it could not be assumed [§ 1159] . . . was void on its face" (388 U. S. at 317), the Alabama Supreme Court held that *Walker* "seems to us to be in direct conflict with the conclusion reached in the majority opinion of the Court of Appeals of Alabama here under review" (R. II, 19-20; App., p. 11).

But to read *Walker* as supporting the facial constitutionality of a licensing ordinance such as § 1159 is a dangerous distortion of this Court's decision which the Court should quickly correct before it gains currency in the lower courts. In *Walker*, the Court merely refused to disturb Alabama's ruling that the validity of the ordinance and the injunction embodying it could not be tested in a criminal contempt proceeding. It was in this context that

[10] R. II, 16-23; App., pp. 9a-14a, *infra*.

the prevailing opinion said that the ordinance could not "be assumed" to be void. The Court was thus far from sustaining the constitutionality of § 1159; to the contrary, it noted that the "generality" of the ordinance's language unquestionably raised "substantial constitutional issues" (388 U. S. at 316). And the Chief Justice, in a dissenting opinion which Justices Brennan and Fortas joined, expressed the belief that § 1159 was "patently unconstitutional on its face" (388 U. S. at 328).

The effect of the decision below is to convert *Walker* and *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), into a two-pronged instrument for the validation and perpetuation of unconstitutional licensing regimes. If this device succeeds, it will effectively destroy the salutary principle long adhered to by this Court as an indispensable element of the protection afforded free expression against impermissible censorship: the principle of cases such as *Lovell* v. *Griffin*, 303 U. S. 444 (1938), and *Staub* v. *Baxley*, 355 U. S. 313 (1958), that a facially unconstitutional licensing law is wholly void and need not be complied with.

Under § 1159 as written, and as it confronted petitioner Shuttlesworth in 1963, the Birmingham licensing authority is granted power to withhold a parade permit if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" require it. A more explicit grant of unconstitutional censorial power can hardly be imagined.[11] If, in supposed reliance upon

[11] "When local officials are given totally unfettered discretion to decide whether a proposed demonstration is consistent with 'public welfare, peace, safety, health, decency, good order, morals or convenience,' as they were in this case, they are invited to act as censors over the views that may be presented to the public" (*Walker* v. *City of Birmingham*, *supra*, 388 U. S. at 329) (dissenting opinion of Warren, *C.J.*). See authorities collected in note 15, *infra*.

Walker, such an ordinance can be retroactively rewritten so as to save its constitutionality by excising most of its operative language, there is no licensing legislation that cannot be similarly sustained. And if, as the court below interpreted the doctrine of *Cox,* the post-operative shape of the legislation warrants imposing criminal liability upon those who read it as it was written and decline to comply with a palpably unconstitutional censorship scheme, the consequence is clear and frightening. *Lovell* v. *Griffin* is dead; *Staub* v. *Baxley* is dead; every licensing regulation—however broad the discretionary power it appears to confer upon the licensing authorities over the activities of the persons required to be licensed—must be obeyed.

The resultant damper on constitutionally guaranteed freedoms of expression is obvious. The States are permitted and encouraged to hold out a broad and overhanging threat of greater censorship than the Constitution permits them to exact. So long as the threat is effective and fear of attendant criminal penalties discourages challenge to it, the censorship exerts its full, unconstitutional repressive effect. When and if a challenge is mounted, the state courts (which may or may not be the highest court of a state) announce that the statutory regulation does not mean what it plainly says, and—without removing the overbroad language from the statute books, where it remains to be invoked by the licenser and to cow laymen subject to regulation under it—give it some *post hoc* verbal construction designed and sufficient to bring it barely back across the line of constitutional condemnation.

Just this sort of regulation of speech conduct, wherein a State undertakes to threaten by ostensible prohibition a broader range of protected activities than it can constitu-

tionally restrict, has been voided by this Court in numerous contexts other than licensing laws. E.g., *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). Its emergence in the licensing area, under the aegis of *Cox* v. *New Hampshire* and the *Walker* decision as construed below, we submit, poses a menace to First Amendment freedoms that this Court should now review.

In saying this, we do not for a moment question the soundness of the basic *Cox* principles: that it is constitutionally permissible for a State or a municipality to require that parades be licensed, under proper standards and procedures; and that persons who parade without the license required by valid legislation may be criminally punished consistent with the Constitution. But, as appears from the decision below, those basically sound principles afford substantial opportunities for abuse, and therefore require at least occasional review by this Court of their administration, so as to assure that they are restricted to their proper compass. We respectfully suggest that the time is now ripe for a review of the question of what limitations must effectively be placed on a municipal licensing scheme in order to bring it within the validating principles of *Cox*, and that the present case presents a peculiarly fit occasion for that review.

For it is clear that what the Alabama Supreme Court has done here is retroactively to validate some 1500 criminal charges, plainly impermissible incidents of an unconstitutional licensing procedure when made, by wrapping them about with the mere verbal habiliments of the *Cox* opinion. Not only does this have the effect of legalizing

the illegal conduct of the Birmingham authorities—and illegalizing the legal conduct of the 1500 Birmingham civil rights demonstrators—in 1963; it also leaves Birmingham Code § 1159 and literally hundreds of cognate statutes and ordinances[12] lying about like so many traps against future free speech activity. Even in the case of § 1159 itself, which now has been given an authoritative if belated limiting construction, the danger of irremediable unconstitutional application remains intense, both because of the gap between the limiting construction and what the face of the ordinance appears to countenance, and because of the absence in Alabama of any administrative or judicial machinery serviceable to make the limiting construction anything more than verbal. And, of course, the danger is greater still in the case of other, similar but as yet unconstrued licensing statutes and ordinances, to which the effect of the decision below is to enforce compliance.

These dangers are apparent upon consideration of the alternatives open to the citizen wishing to participate in a "parade" (assuming *arguendo* that a citizen has fair warning of what constitutes a "parade," see II B, *infra*), under such a statute or ordinance:

1. The citizen can submit to the issuer's discretion and, if his permit application is denied, can attempt to seek review of this denial; or,

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[12] Statutes and ordinances creating broadly discretionary licensing regimes appear to be ubiquitous, notwithstanding this Court's repeated condemnation of them (see note 15, *infra*). The Jackson ordinance condemned in *Guyot* v. *Pierce*, 372 F. 2d 658 (5th Cir. 1967), for example, was a portion of the Uniform Traffic Code. See also, e.g., *Baker* v. *Bindner*, 274 F. Supp. 658 (W. D. Ky. 1967); *King* v. *City of Clarksdale*, 186 So. 2d 228 (Miss. 1966); *Gamble* v. *City of Dublin*, 375 F. 2d 1013 (5th Cir. 1967).

2. The citizen can refuse to make application for a parade permit and attempt to challenge the regime of the ordinance if he is prosecuted for parading without a permit.

The second alternative is plainly foreclosed by the decision below. As we have pointed out, if Birmingham Code § 1159 can be retroactively rewritten and thereby validated by judicial construction in a criminal prosecution, any licensing legislation can. All must therefore be obeyed.

But the remaining alternative—to obey and seek a permit—is an equally repressive requirement, for several reasons. In the first place, a system of enforced compliance with overbroad licensing laws presents no real means of challenging their coercive effect because in practice it preserves wide-open, operative and unchallengeable the discretion in the issuer of parade permits. Alabama is no exception. In Alabama, judicial review is theoretically available by way of mandamus, see Code of Ala., Tit. 7, § 1072, but that remedy is largely ineffective because there is no requirement of dispatch, compare *Freedman* v. *Maryland,* 380 U. S. 51 (1965) and *Teitel Film Corp.* v. *Cusack,* —— U. S. ——, 19 L. ed. 2d 966, January 29, 1968, and because the citizen must overcome a nearly impossible burden of showing that administrative discretion has been abused:

> "To warrant the issuance of mandamus, not only must there be a legal right in the relator, but, owing to the extraordinary and drastic character of mandamus and the caution exercised by courts in awarding it, it is also important that the right sought to be enforced be clear and certain, so as not to admit of any reasonable controversy. The writ does not

issue in cases where the right in question is doubtful. . . . ". *Lassiter* v. *Werneth,* 275 Ala. 555, 156 So. 2d 647, 648 (1963); see also *Ducourneau* v. *Langan,* 149 Ala. 647, 43 So. 187 (1907).

The facts that the administrative decision challenged is not required to be made on a record of regular procedures; or to be supported by any statement of reasons; and that there is not even required to be kept any administrative log or recording of permit grants and denials (R. I, 32), make virtually insuperable the difficulty of proving a case of judicially revisable arbitrary or discriminatory enforcement. This, together with the prospect of delay involved in judicial challenge, makes reversal of the denial of a permit application in any particular case highly unlikely. And, in any event, no general construction of the overbroad permit law is assured by this route; while facial challenge to it is, of course, denied.

But, there is, in the second place, good reason why this Court has long endorsed the principle that citizens should be free to refuse to submit to a licensing scheme which has a coercive effect upon First Amendment rights. These overbroad laws are numerous and their prior restraints affect large numbers of people who cannot be supposed to have the knowledge and resources to combat them by prolonged administrative and judicial challenge. In this case alone, 1500 people were subjected to the prior restraints of the Birmingham parade ordinance. If they had sought parade permits under the ordinance, it was and is speculative what construction would have been put upon § 1159 by the Birmingham authorities or the Alabama courts, or how long the demonstrators would have been in court before obtaining any construction. One thing, we think, is

clear: there would have been no civil rights Easter marches in Birmingham in 1963. It was not heedlessly, we suggest, that *Lovell* v. *Griffin*, 303 U. S. 444, 452-53 (1938) and *Staub* v. *Baxley*, 355 U. S. 313, 319 (1958), stated this Court's preference for allowing challenges to the whole regime created by such overbroad licensing laws. The Court recognized that only by facilitating challenges to the law itself could its coercive sting be removed.

Third, Birmingham Code § 1159, in its effective operation in 1963 and by its language on the books today, *expressly* embodies an unconstitutionally broad grant of censorial licensing power. This was not the case, it should be noted, of the ordinance challenged in *Cox*. The *Cox* ordinance merely provided that licenses for parades and certain other gatherings must be obtained. Not surprisingly, the New Hampshire Supreme Court held that the discretion of the issuer of parade permits was governed by the standard of considerations of time, place and manner in order "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." *Cox* v. *New Hampshire*, 91 N. H. 137, 144, 16 A. 2d 508, 514 (1940), quoted with approval, 312 U. S. at 576. The New Hampshire Supreme Court relied on "the unbeatable proposition that you cannot have two parades on the same corner at the same time"[13] and, of course, this Court agreed.

Thus, the problem not presented in *Cox* but presented here is how to remedy a parade permit law which on its face appears to grant to officials far more discretionary

[13] Kalven, *The Concept of the Public Forum*, 1965 Supreme Court Review, 1, 25.

licensing power than the Constitution allows. The verbal solution offered by the court below—eliminating the standards of "public welfare," "peace," "safety," "health," "decency," "good order" and "morals" and keeping only the standard of "convenience" (R. II, 16; App., p. 8a, *infra*)—is a plainly unsatisfactory remedy, at least as applied in petitioner's case. True, the court below took great pains to chop off the language of the Birmingham parade ordinance and to substitute for it the language of this Court and the New Hampshire Supreme Court in *Cox*.[14] But that disposition—operating *post facto* on the past and with speculative and unassured efficacy for the future—hardly cures the problem. Birmingham's licensers still have the unchanged face of the Code to point to in their dealings with citizens; and if those dealings are abusive, no adequate machinery is available to convert the Alabama Supreme Court opinion below into an effective and enforceable restraint upon the day-to-day reality of the licensing system.

The foregoing considerations put into focus the trouble with the disposition by the court below: it punishes the citizen who, by daring to challenge an overbroad prior restraint, succeeds in having it limited to proper constitutional bounds. This punishment is the reward of that citizen although, in Alabama, his challenge is the only

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[14] The standards stated in the Alabama Supreme Court's opinion are lifted without citation from the New Hampshire Supreme Court's opinion, viz., that the discretion must be exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use [of the highways]" must be followed (91 N. H. at 143, 16 A. 2d at 513; R. II, 16; App., p. 8a).

effective way to curb the coercive effects of an overbroad prior restraint such as the Birmingham parade ordinance.

We do not see how such a result can be squared with the principle of this Court's *Griffin* and *Staub* decisions. Perhaps in cases where the machinery of administrative decision-making and judicial review is clearly established, effective and timely to restrict broad prior restraints, the *Griffin-Staub* right to be wholly free of those restraints may be abrogated. But that is not the case here. The Alabama Supreme Court may have adopted the *Cox* language; it has not yet adopted *procedures* adequate to insure effective respect for the *Cox* principle of "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" (see note 14, *supra*). Whether, without such procedures, its ostensible conformance to *Cox's* constitutional standards satisfies *Cox* and the Constitution, presents a question of great moment which this court should grant *certiorari* to decide.

II.

Certiorari Should Be Granted to Decide Whether the Decision Below Conflicts With *Bouie* v. *Columbia*, 378 U. S. 347 (1964), Because Petitioner Was Given No Fair Warning That He Was Required to Secure a Parade Permit. A) Because Prior Decisions of This Court Taught Petitioner That He Need Not Submit to a Permit Ordinance Patently Unconstitutional on Its Face and B) Because Petitioner Only Participated in a Peaceful, Orderly and Nonobstructive Walk Along the Sidewalks of Birmingham.

A. Five years ago, petitioner was confronted with a parade ordinance which granted power to Birmingham officials to withhold a parade permit if "in [their] . . . . judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" required it.

Leaving aside the question whether petitioner could foresee that the ordinance had any application to his activities (discussed in II B, *infra*), petitioner had ample authority in the decisions of this Court[15] to be "[u]nable to believe

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[15] *Cox* v. *Louisiana*, 379 U. S. 536, 553-558; *Lovell* v. *Griffin*, 303 U. S. 444, 447, 451; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Schneider* v. *State*, 308 U. S. 147, 157, 163-164; *Cantwell* v. *Connecticut*, 310 U. S. 296, 305-307; *Largent* v. *Texas*, 318 U. S. 418, 422; *Marsh* v. *Alabama*, 326 U. S. 501, 504; *Tucker* v. *Texas*, 326 U. S. 517, 519-520; *Saia* v. *New York*, 334 U. S. 558, 559-560; *Kunz* v. *New York*, 340 U. S. 290, 294; *Niemotko* v. *Maryland*, 340 U. S. 268, 271-272; *Staub* v. *Baxley*, 355 U. S. 313, 322-325; *Jones* v. *Opelika*, 316 U. S. 584, 600-603 (Stone, *C. J.* dissenting), 611, 615 (Murphy, *J.* dissenting), dissenting opinions adopted *per curiam* on rehearing, 319 U. S. 103, cf. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 90; *Freedman* v. *Maryland*, 380 U. S. 51, 56.

that such a blatant and broadly drawn prior restraint on . . . First Amendment rights could be valid." [16]

Moreover, petitioner had good reason to believe that the *Griffin-Staub* principle discussed in Part I, *supra,* allowed him to refuse to submit to and then challenge this blatant and broadly drawn prior restraint on First Amendment rights. Even if the Alabama Supreme Court's judicial repealer of § 1159 is held to meet the *Cox* standards, and even if the *Griffin-Staub* principle is held not to shield from punishment those citizens who succeed, by challenging such a blatant prior restraint, in limiting it, at least petitioner and the 1500 other Birmingham civil rights demonstrators arrested in the Easter week, 1963 marches should not be punished for their reliance upon this principle. Punishment of this sort, for conduct expressly validated by long-settled and repeated decisions of the highest Court of the land, would plainly affront the ordinary principles of *mens rea* common to the criminal law. Cf. *James* v. *United States,* 366 U. S. 213 (1961). We submit that it would violate, as well, the rudimentary guarantee of fair notice imposed on state criminal procedure by the Due Process Clause, see *Bouie* v. *Columbia,* 378 U. S. 347 (1964), and urge that *certiorari* be granted to so decide.

B. Petitioner was convicted for taking part in a peaceful protest demonstration consisting of 52 persons walking two abreast in an orderly and nonobstructive manner on the public sidewalks of Birmingham, Alabama. His crime was that he had not obtained a permit from Birmingham authorities to do so.

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[16] *Walker* v. *City of Birmingham, supra,* 388 U. S. at 327 (opinion of Warren, *C.J.*).

In the courts below, petitioner maintained that there was insufficient evidence to sustain the charge that he participated in "a parade or procession on the streets of the city" (Complaint, R. I, 3). Put another way, petitioner denied that he required a parade permit to do what he did.

The Court of Appeals of Alabama agreed, holding (R. I, 116, 118; 180 So. 2d at 139; App., pp. 65a, 67a, *infra*):

> Here, we consider the proof . . . fails to show a procession which would require, under the terms of § 1159, the getting of a permit.
>
> • • • • •
>
> We emphasize that we have only before us a walking on city sidewalks. In the use of the roadway probably less stringent standards of construction would prevail against the prosecutor.

This holding was fully consistent with the history of the operation and enforcement of § 1159. The permit-issuing authorities did not issue permits for walking on the sidewalk (R. I, 33). The police did not usually arrest persons for walking on the sidewalks; when they did, the courts did not sustain such convictions.[17]

Notwithstanding the prior operation, enforcement and construction of § 1159, the Supreme Court of Alabama held that there *was* sufficient evidence of a "parade" to constitute a violation of the ordinance (R. II, 21; App.,

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[17] See *Primm* v. *City of Birmingham*, 42 Ala. App. 657, 177 So. 2d 326 (Ct. App. Ala. 1964).

p. 12a; *infra*).[18] In doing so, the court below brought itself into conflict with the doctrine of *Bouie* v. *Columbia*, 378 U. S. 347 (1964).

In *Bouie*, the Court held violative of the due process clause of the Fourteenth Amendment convictions under a statute which had been "unforeseeably and retroactively expanded by judicial construction" (378 U. S. at 352). Prior to the Supreme Court of Alabama's decision in this case, the term "parade" had a fairly certain meaning in Birmingham. A "parade" included bands and vehicles (R. I, 33); it occurred in the streets, not on the sidewalks (R. I, 33); it contained, the ordinance assumed, "persons, vehicles and animals."

Otherwise, there would be little justification for having a permit system at all. A permit system is justified by the fact that a person wishing to hold a "parade", in the accepted sense, i.e., with bands and/or vehicles, requires the *exclusive* enjoyment of particular streets at a particular time. A permit system gives "the public authorities notice in advance so as to afford opportunity for proper policing" (*Cox* v. *New Hampshire*, *supra*, 312 U. S. at 576).

That rationale has no application here. It is undisputed that petitioner's use of the sidewalks of Birmingham at approximately 2:15 p.m. on April 12, 1963, was in no way inconsistent with the use by other citizens of Birmingham of those very same sidewalks at that very same time. The Court of Appeals correctly held (R. I, 117; 180 So. 2d at 139; App., p. 66a, *infra*):

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[18] "We see no occasion to deal at length with the holding . . . [below] that the evidence was insufficient to show that Shuttlesworth had engaged in a parade . . . " (R. II, 21; App., p. 12a, *infra*).

> The City failed to show whether or not other pedestrians were run off the sidewalk, blocked either in access, process or transit.[19]

Having reference then to the theory and practice of the Birmingham parade ordinance, petitioner had no fair warning that his participation in a peaceful, orderly and non-obstructive walk on the sidewalks of Birmingham required a parade permit.

Petitioner may now be on notice for the future. It may now be that football fans on their way to the stadium without a parade permit risk prosecution under § 1159, should city authorities "choose so vigorously to protect the sidewalks of Birmingham."[20] Whether or not[21] that is now the state of the law, one thing is clear: The court below's unforeseeable and retroactive application of the Birmingham parade ordinance to petitioner appears inconsistent with *Bouie* v. *Columbia, supra.*

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[19] Cf. *Cox* v. *New Hampshire, supra,* 312 U. S. at 573:
> The marchers interfered with the normal sidewalk travel, but no technical breach of the peace occurred.

[20] *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 100 (1965) (concurring opinion of Fortas, *J.*).

[21] "If one were to confine oneself to the surface version of the facts, a general alarm for the people of Birmingham would be in order. Their use of the sidewalks would be hazardous beyond measure.". *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 101 (1965) (concurring opinion of Fortas, *J.*).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CONCLUSION

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APPENDIX

Opinion of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

OCTOBER TERM 1967-68

November 9, 1967

6 Div. 291

Ex parte City of Birmingham

In re FRED L. SHUTTLESWORTH

—v.—

CITY OF BIRMINGHAM.

PETITION FOR CERTIORARI TO COURT OF APPEALS

LAWSON, *Justice.*

Fred L. Shuttlesworth was convicted in the Recorder's Court of the City of Birmingham of parading without a permit in violation of §1159 of the General City Code of Birmingham, hereinafter referred to as §1159, which reads:

> "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public

demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

The word "commission" as used in §1159 refers to the governing body of the City of Birmingham.

Following his conviction in the Recorder's Court, Shuttlesworth appealed to the Circuit Court of Jefferson County, where there was a de novo trial before a jury. The jury found Shuttlesworth guilty and the trial court, after rendering a judgment in accordance with the verdict of the jury, sentenced Shuttlesworth to pay a fine of $75 and to perform ninety days hard labor for the City of Birmingham.

Shuttlesworth then appealed to the Court of Appeals of Alabama which court, in a two-to-one decision, reversed the judgment of the Circuit Court of Jefferson County and rendered a judgment discharging Shuttlesworth "sine die." Judge Cates wrote the majority opinion, in which Presiding Judge Price concurred. Judge Johnson dissented.—*Shuttlesworth* v. *City of Birmingham*, 43 Ala. App. 68, 180 So. 2d 114.

The City of Birmingham filed petition in this court for a writ of certiorari to review and revise the opinion and judgment of the Court of Appeals. We granted the writ.

While we are not altogether certain as to the exact reasons why the majority of the Court of Appeals concluded that Shuttlesworth's conviction should be reversed and that he should be discharged sine die, we will treat that opinion as holding that §1159 is void on its face because of overbroad and consequently meaningless standards for the issuance of permits for parades or processions; that said section has been enforced by the City of Birmingham in such a way as to make it unconstitutional under the holding of the Supreme Court of the United States in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; that the evidence adduced by the City of Birmingham in the trial in the circuit court was insufficient to present a jury question as to whether Shuttlesworth had, in fact, been engaged in a parade, procession or other public demonstration in the streets or other public ways of the City of Birmingham without first having obtained a permit as required by §1159.

In view of the fact that there was a dissenting opinion, we have gone to the original record to determine the facts.

The majority opinion of the Court of Appeals does not contain a complete statement of the facts. However, the

dissenting opinion of Judge Johnson contains a rather lengthy recitation of the facts and our examination of the original record shows that the facts as stated in the dissenting opinion are fully supported by the record.

The dissenting opinion, unlike the majority opinion of the Court of Appeals, takes cognizance of the rule so often stated by the appellate courts of this state, to the effect that it is the duty of courts not to strike down a city ordinance or a statute as unconstitutional, if by reasonable construction it can be given a field of operation within constitutional limits and that where a statute or ordinance is susceptible of two constructions, one of which will defeat the ordinance or statute and the other will uphold it, the latter construction will be adopted.

With that rule in mind, Judge Johnson proceeds to construe §1159, saying:

> "I think it is obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organize [sic] formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions. Thus, the required information is related to the proper regulation of the use of the streets, and the fact that such information is required indicates that

the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

"Section 1159, supra, provides that the Commission shall issue a permit 'unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.' I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied is obvious from the purpose of the ordinance. It would be of little or no value to state that the standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted ap-

pellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed" (180 So. 2d, 144).

We agree with and adopt the construction which Judge Johnson has placed on §1159 and we agree with his observations to the effect that such construction finds support in the case of *State* v. *Cox,* 91 N. H. 137, 16 Atl. 2d 508, which case was affirmed, in a unanimous decision, by the United States Supreme Court.—*Cox* v. *State of New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049.

The New Hampshire Supreme Court, as is pointed out in Judge Johnson's dissenting opinion, was called upon to determine the constitutionality of a state statute prohibiting, among other things, a parade or procession on the streets without a permit from local authorities. The New Hampshire statute did not set out a standard for granting or refusing the permit. The language of the New Hampshire court answering the assertion that the statute under consideration vested unwarranted control in the licensing authorities is quoted in Judge Johnson's opinion and will not be repeated here.

In the New Hampshire case, the marchers were divided into four or five groups, each composed of about fifteen to twenty persons. Each group proceeded to a different part of the business district of the City of Manchester and then lined up in a single-file formation and marched along sidewalks of the city in such a formation. The marchers carried banners and distributed leaflets announcing a

meeting to be held at a later time where a talk on government would be given to the public free of charge. The marchers had no permit. Despite the fact that the marchers were carrying banners and distributing leaflets as well as marching, their conviction of parading without a permit was affirmed by the Supreme Court of New Hampshire.—*State* v. *Cox, supra.*

In affirming the judgment of the Supreme Court of New Hampshire, the Supreme Court of the United States in *Cox* v. *New Hampshire, supra,* said in part as follows:

> "The sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a 'parade or procession' upon a public street is not here involved and the question of the validity of an ordinance addressed to any other sort of conduct than that complained of is not before us.
>
> "There appears to be no ground for challenging the ruling of the state court that appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: 'It was a march in formation, and its advertising and informatory purpose did not make it otherwise. . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets.'
>
> • • • • •

"If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right" (312 U. S., 573-576).

We would like to point out that we do not construe §1159 as conferring upon the "commission" of the City of Birmingham the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. See *Edwards* v. *South Carolina,* 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697.

We also hold that under §1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.

Since the Court of Appeals of Alabama rendered its decision and judgment in the case here under review, the Su-

preme Court of the United States rendered a decision in a case wherein §1159 was involved. See *Wyatt Tee Walker* v. *City of Birmingham,* decided by the Supreme Court of the United States on June 12, 1967, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——. Application for rehearing was denied on October 9, 1967. The Walker case, *supra,* was in the Supreme Court of the United States on writ of certiorari to review the opinion and judgment of this court in the case of *Walker et al.* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 493, wherein we affirmed the conviction of Walker and several others, including Shuttlesworth, of criminal contempt for violating a temporary injunction issued by the Circuit Court of Jefferson County, in Equity, which enjoined Walker, Shuttlesworth and others from engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or mass demonstrations without a permit. The injunction enjoined the respondents from carrying on other activities which we do not think necessary to comment on here. In our case of *Walker et al.* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 493, we did not expressly pass on the constitutionality of §1159, although the petitioners, that is, Walker, Shuttlesworth and others, asserted that said §1159 is void because it violates the First and Fourteenth Amendments to the Constitution of the United States. Based on that premise, the said petitioners also argued that the temporary injunction was void as a prior restraint on the constitutionally protected rights of freedom of speech and of assembly.

Our affirmance of the criminal contempt convictions was based on the principle "that the circuit court had the duty and authority, in the first instance, to determine the validity of the ordinance, and, until the decision of the circuit court is reversed for error by orderly review, either by the

circuit court or a higher court, the orders of the circuit court based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be punished. Howat v. State of Kansas, 258 U. S. 181, 42 S. Ct. 297, 66 L. Ed. 550."

As we have heretofore indicated, the Supreme Court of the United States on June 12, 1967, affirmed our judgment in *Walker et al.* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 483. The Supreme Court of the United States divided five to four. It appears from the Court's opinion, written by Mr. Justice Stewart, and from the opinions of the dissenting Justices, that the petitioners in the Supreme Court of the United States again asserted that §1159 was void on its face. The dissenting Justices expressed the view that §1159 is unconstitutional on its face.

However, the majority of the Court, as then constituted, did not hold that §1159 is void on its face. The Court's opinion contains the following language:

> "The generality of the language contained in the Birmingham parade ordinance [§1159] upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions. Schneider v. State, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280. The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire Courts in Cox v. New Hampshire [312 U. S. 579, 71

S. Ct. 762, 85 L. Ed. 1049] and Poulos v. New Hampshire [345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105], both supra. Cf. Shuttlesworth v. City of Birmingham, 382 U. S. 87, 91, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176; City of Darlington v. Stanley, 239 S. Ct. 139, 122 S. E. 2d 207. *Here, just as in Cox and Poulos, it could not be assumed that the ordinance was void on its face.*" (Emphasis supplied) (87 S. Ct., 1830)

The language which we have just italicized seems to us to be in direct conflict with the conclusion reached in the majority opinion of the Court of Appeals of Alabama here under review.

We are of the opinion that the construction which Judge Johnson placed on §1159 in his dissenting opinion, which we have in effect adopted, together with the construction which we have placed on §1159 in this opinion, requires a reversal of the judgment of the Court of Appeals here under review.—*Cox* v. *New Hampshire*, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; *Walker et al.* v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——.

We hold that §1159 is not void on its face and that under the construction which we have placed on that section, it did not deprive Shuttlesworth of any right guaranteed to him under the First and Fourteenth Amendments to the Constitution of the United States.

We are also in accord with the conclusion reached by Judge Johnson in his dissenting opinion to the effect that there is nothing in the record before us tending to show that §1159 has been applied in other than a fair and nondiscriminatory fashion. The record before us shows no violation of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

The petitioners in the case of *Wyatt Tee Walker et al. v. City of Birmingham,* 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed 2d ——, decided by the Supreme Court of the United States on June 12, 1967, asserted that they were free to disobey the injunction because §1159, on which the injunction was based, had been administered in an arbitrary and discriminatory fashion. In support of that contention those petitioners had sought to introduce evidence in the trial court to the effect that a few days before the injunction issued requests for permits to picket had been made to a member of the City Commission and one request had been rudely refused and that this same official had later made it clear that he was without power to grant the permit alone, since the issuance of permits was the responsibility of the entire Commission. The Supreme Court of the United States, in answering that contention, said as follows: "Assuming the truth of the proffered evidence, it does not follow that the parade ordinance is void on its face."

We see no occasion to deal at length with the holding or observation contained in the majority opinion of the Court of Appeals of Alabama to the effect that the evidence was insufficient to show that Shuttlesworth had engaged in a parade on the "streets or other public ways of the City of Birmingham without a permit." The evidence as delineated in the dissenting opinion of Judge Johnson, in our opinion, clearly shows that such a violation occurred.

We can see no merit in the position apparently taken in the majority opinion of the Court of Appeals of Alabama to the effect that since the marchers paraded on the sidewalks of the City of Birmingham rather than in the streets, there had been no violation of said §1159.

Section 2 of the General City Code of Birmingham of 1944 reads in part:

"Sec. 2. Definitions and rules of construction.

"In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise.

* * * * *

"Sidewalk: The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

It is appropriate to note that the statute under consideration in the case of *State* v. *Cox*, 91 N. H. 137, 16 Atl. 2d 508, prohibited a parade or procession on streets without a permit from local authorities. The parade or procession in which Cox was involved occurred on the sidewalks of the city of Manchester. Neither the Supreme Court of New Hampshire nor the Supreme Court of the United States took the position that the statute involved did not apply to sidewalks as well as to the portion of the street generally used by vehicular traffic. Cox's conviction of parading without a permit was upheld by the courts.

We are aware of the fact that ordinances somewhat similar to §1159 have been declared unconstitutional in two recent federal cases. See *Gayat* v. *Pierce* (U. S. Court of Appeals, 5th Circuit), 372 F. 2d 658; *Baker et al.* v. *Binder*, decided in the United States District Court for the Western District of Kentucky at Louisville. That was a three-judge court, with one judge dissenting. No reference was made in the opinions delivered in those cases to *Walker et al.* v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——. Perhaps we have placed too much reliance on *Walker et al.* v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, —— L. Ed. 2d ——, and on *Cox* v.

New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049. We may have misinterpreted the opinions in these cases. If so, we will no doubt be set straight.

In view of the foregoing, the judgment of the Court of Appeals is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

Livingston, C. J., Goodwyn, Merrill, Coleman and Harwood, JJ., concur.

Judgment of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

OCTOBER TERM 1967-68

November 9, 1967

6th Div. 291

C/A 6th Div. 979

Ex parte: City of Birmingham,
a Municipal Corporation

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS

(Re: Fred L. Shuttlesworth v. City of Birmingham)

WHEREAS, on January 20, 1966, the Writ of Certiorari to the Court of Appeals was granted, and said cause was set down for submission on briefs or oral argument; WHEREUPON,

Comes the petitioner, by its attorney, and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Court of Appeals there is manifest error.

IT IS THEREFORE ORDERED AND ADJUDGED that the judgment of the Court of Appeals be reversed and annulled and the cause remanded to said Court for further proceedings therein.

IT IS FURTHER ORDERED AND ADJUDGED that the costs incident to this proceeding be taxed against the respondent, Fred L. Shuttlesworth, for which costs let execution issue.

Opinion of the Court of Appeals of Alabama

THE ALABAMA COURT OF APPEALS

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

OCTOBER TERM, 1965-66

November 2, 1965

6 Div. 979

FRED L. SHUTTLESWORTH

v.

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

CATES, *Judge*:

This appeal was submitted February 27, 1964, and was originally assigned to JOHNSON, *J.*

Shuttlesworth was convicted by a jury in a circuit court trial de novo. The City charged him with a breach of its ordinance against parading without a permit. §1159, General City Code of 1944.[1]

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[1] "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or

Pursuant to verdict, the trial judge adjudicated him guilty, fined him $75.00 and costs, and also sentenced him to ninety days hard labor for the City.

There are three questions for decision: (1) whether §1159, supra, denies, on its face, due process of law; (2) whether or not the ordinance as applied violates *Yick Wo* v. *Hopkins,* 118 U. S. 356; and (3) the sufficiency of the evidence.

I.

Facts

About two o'clock, P. M., Good Friday, April 12, 1963, some fifty-two persons issued from a church on Sixth Avenue, North, in Birmingham. They went easterly on the sidewalk of Sixth Avenue crossing Fifteenth and Sixteenth Streets. At Seventeenth Street they turned south, then at Fifth Avenue east again.

The defendant was one of the first to emerge from the church. Various city policemen saw him thereafter, sometimes walking along with and sometimes alongside the others, once bounding from front to rear.

The group went along sometimes two, sometimes three, sometimes four, and at one time a witness saw one rank of six abreast. This observed bunching up coincided with

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other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

the promenaders being blocked by officers parking police cars athwart the crossing at Fifth Avenue and Eighteenth Street.

There was no evidence that any of the group jaywalked, or that they got into the vehicular roadway except at designated cross walks. Nor did they obstruct cars or pedestrians nor disobey any traffic lights, or officers directing traffic. The only tendency toward showing disorderly conduct lay in evidence that some of the group sang and clapped hands.

The defense adduced no permit for a procession or parade nor was there evidence of anyone applying for a permit. Conversely, the City's proof showed no permit of record for the day in question.

II.

Background

A procession has been described as an assembly in motion. 72 C. J. S., p. 1204, states:

> "• • • a group, especially of persons or of vehicles containing persons, moving onward in an orderly, ceremonious, or solemn manner; an orderly file or formation, especially of marchers; a parade."

The essence seems to lie in the group's having ad hoc and pro tempore exclusive possession of all or part of a public way.

Early—probably when in the grip of his fondness for referring to the public as the "Mob"—Holmes, *J.*, in *Commonwealth* v. *Davis*, 162 Mass. 510, 39 N. E. 113, spawned what Judge Conway of the New York Court of Appeals characterized as "the plenary power [of public officers]

over use of streets and parks." *P.* v. *Kunz,* 300 N. Y. 273, 90 N. E. 2d 455, at 462. Cf. *Kunz* v. *New York,* 340 U. S. 290.

However, though the *Davis* case was approved in the United States Supreme Court (167 U. S. 43), its assurance has been eroded by later First-Fourteenth Amendment cases beginning with *Hague* v. *Committee,* 307 U. S. 496.

Consequently in 1941, we find the court saying in *Commonwealth* v. *Anderson,* 308 Mass. 370, 32 N. E. 2d 684 (hn. 2), concerning an ordinance of Boston as applied to a Jehovah's Witness:

> "• • • there is no suggestion in the agreed facts that the defendant was obstructing traffic, causing danger, or annoying travellers in any way, or that the form of the placards or the writing upon them was indecent, libellous, likely to incite violence or otherwise objectionable. Nor do the terms of the ordinance itself limit its prohibition to instances where these or similar conditions exist. The particular case here presented is one of the unqualified interdiction of a wholly inoffensive display of placards on a public street unless the defendant should submit to the requirement that he first obtain a permit. Whatever result might be reached if the ordinance, by its wording, affected only carefully defined instances of conduct actually inimical to the public interest, or if the proof had disclosed such conduct, we must at least conclude that under decisions by which we are bound the application of this ordinance to this defendant in this instance violated his constitutional right to do what he did without a previous permit from anyone. • • •"

And in the same volume on a consolidated appeal, *Commonwealth* v. *Pascone,* 308 Mass. 591, 33 N. E. 2d 522, we find the same rule again applied with a precise distinction of ratio decidendi in affirming the second case.

Moreover, in express terms the Massachusetts court, in 1947, comes to grips with the *Davis* case, supra, *Commonwealth* v. *Gilfedder,* 321 Mass. 335, 73 N. E. 2d 241 (hn. 3). The opinion confesses puzzlement at how the Supreme Court could speak as it did to its judgment in *Hague* and yet not have overruled *Davis,* supra. The *Gilfedder* opinion by the distinguished Justice (and later Chief Justice) Qua is worthy of close study as a persuasive and considered precedent as to the use of parks by the public.

Hague was decided in 1939. The history of Mayor Hague's resistance to union activity of virtually all sorts cannot be ignored. Nor can that factor be gainsaid in assessing the 5-2 division in the then membership of the court. The opening paragraph, 307 U. S., at 500, is:

> "The judgment of the court in this case is that the decree is modified and as modified affirmed. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of the case. MR. JUSTICE ROBERTS has an opinion in which MR. JUSTICE BLACK concurs, and MR. JUSTICE STONE an opinion in which MR. JUSTICE REED concurs. The CHIEF JUSTICE concurs in an opinion. MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent for reasons stated in opinions by them respectively."

Carefully analyzed it is obvious that only Mr. Justice Butler (in dissent) was expressly willing to stand by *Davis* v. *Massachusetts,* 167 U. S. 43.

Roberts, *J.*,[3] said of Davis[4] (515):

> "The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks."

After pointing out that the Jersey City ordinance explicitly required permits *only for public parades or assemblies,* he made this oft quoted statement:

> "• • • Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for com-

[3] The writer suspects that Mr. Justice Roberts in *Hague,* was chary of "re-examination of constitutional principles" and hence chose to follow the English practice of distinguishing a prior precedent into such narrow confines that its immurement is that of a tomb.

[4] The Boston ordinances banned (without a permit from the Mayor) firing cannons, or firearms, hawking goods, setting up shows, etc., as well as public addresses.

munication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

"We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."

At this point we pick up the decisions which follow in the train of the *Hague* case. The early '40's saw the emergence of the Jehovah's Witnesses cases.[5]

In *Lovell* v. *Griffin*, 303 U. S. 444, the court had held void an ordinance prescribing a permit to distribute literature.

Then after *Hague*, in 1939, we find:

Schneider v. *State*, 308 U. S. 147 (1939);
Carlson v. *California*, 310 U. S. 106 (1940);
Jamison v. *Texas*, 318 U. S. 413 (1943);

[5] See Harper, *Justice Rutledge and the Bright Constellation*, 46, et seq.

Largent v. *Texas,* 318 U. S. 418 (1943);
Jones v. *Opelika,* 319 U. S. 103 (1943);
Murdock v. *Pennsylvania,* 319 U. S. 105 (1943);
Saia v. *New York,* 334 U. S. 558 (1948);
Kunz v. *New York,* 340 U. S. 290 (1951);
Gelling v. *Texas,* 343 U. S. 960 (1952);
Fowler v. *Rhode Island,* 345 U. S. 67 (1953); and
Staub v. *City of Baxley,* 355 U. S. 313 (1958).

Against this array, however, stands *Cox* v. *New Hampshire,* 312 U. S. 569, which, unlike the multi-opinion *Hague* decision, came from an unanimous court speaking through Hughes, C. J. This opinion relied heavily on the State Supreme Court's construction in the same case. *State* v. *Cox,* 91 N. H. 137, 16 A. 2d 508.

Here, for affirmance, the City of Birmingham claims that *Cox* is decisive. Concededly, there are many similarities between §1159 of the Birmingham Code of 1944 and the New Hampshire statute there in question.

Corresponding is the broad sweep of licensing: Thus from *Cox,* we find: " • • • no parade or procession upon any public street or way • • • unless a special license therefor • • • ." And of like tenor, §1159 reads: " • • • unlawful to organize • • • any parade or procession or other public demonstration on the streets or other public ways • • • unless a permit • • • ."

Administrative mechanics in each are similar. The New Hampshire Act made no exceptions other than to empower the city licensing committee or board to grant "revocable blanket licenses" to fraternal and other like organizations, to theatres and undertakers.

However, the New Hampshire enactment applied not only to parades and processions but also to performances

or exhibits comprising theatrical or dramatic representations as well as any open air public meeting upon any ground abutting on a street or public way.

Moreover, the New Hampshire court, *State* v. *Cox,* made no reference to any prior judicial or administrative interpretation of the statute. Whereupon, the court proceeded to fill in by implication a variety of requirements: (1) reasonableness; (2) uniformity of treatment of applications; and (3) freedom from improper or inappropriate considerations and from unfair discrimination.

It was undoubtedly this gloss of "a systematic consistent and just order of treatment" which facilitated affirmance in *Cox* v. *New Hampshire,* supra.

Since, however, the validity prima facie of §1159 has not been before any appellate court[6] we find it necessary to examine the unfolding of cases since *Cox.* In *Primm* v. *City of Birmingham,* —— Ala. App. ——, 177 So. 2d 326, we found insufficient evidence.

In passing, we note that in *McMeans* v. *City of Fort Deposit* (Cr. 11, 759-N, U. S. C., M. D., Alabama, September 30, 1965), [Frank M.] Johnson, J., held an identical ordinance of the City of Fort Deposit to be unconstitutional as applied to the facts.

Nevertheless there are at least two reasons which keep us from using the *McMeans* opinion as authoritative as to Shuttlesworth's appeal.

First, the facts there recited disclose no parade or procession but rather only peaceful picketing within the protection of *Thornhill* v. *Alabama,* 310 U. S. 88. *Hotel & Restau-*

[6] A three-judge court presided over by Rives, *J.*, in *King* v. *City of Birmingham* (Civil Action 63-196, U. S. D. C., N. D., Alabama, August 12, 1963), dissolved itself without taking up the constitutionality of §1159.

rant Emp. v. *Greenwood*, 249 Ala. 265, 30 So. 2d 696 (hn. 21).

Second, the opinion states that the City appeared but did not seek a remand to its Recorder's Court.

Third, we recognize that Judge [Frank M.] Johnson is under the review of, and to that extent is bound by, the decisions of the Fifth Circuit. Indeed, his opinion relies on *Rachel* v. *Georgia*, 342 F. 2d 336, and *Peacock* v. *City of Greenwood*, 347 F. 2d 679, to justify removal under 28 U. S. C. 1443.

We understand that *Rachel* is to be taken up for argument and submission by the Supreme Court of the United States[7] at the current 1965-66 Term, probably in contrast with the Third Circuit's denial of removal in *Anderson* v. *City of Chester, Pennsylvania*, 34 L. W. ——.

III.

First Amendment Freedoms

The last term of the Supreme Court effectively saw the Fourteenth Amendment incorporate—albeit hesitantly—the first eight amendments to the Federal Constitution as part of the due process laid upon the states. Cf. Black, J., dissenting in *Adamson* v. *California*, 332 U. S. 46, with the concurring opinions of Harlan and Goldberg, *JJ.*, in *Pointer* v. *Texas*, 380 U. S. 400.

The First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

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[7] Sub nom. *Georgia* v. *Rachel* (No. 147, 1965-66 Term), —— U. S. ——, 34 L. Week 3101.

or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Cardozo, in *The Paradoxes of Legal Science,* at pages 94-96, says:

"'* * * That ill deserves the name of confinement which hedges us in only from bogs and precipices. So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law; and is not, as we are told, "liberty for every man to do what he lists." For who could be free, when every other man's humour might domineer over him? But a liberty to dispose and order freely as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.' Modern research in social science has amplified the thought of Locke, but without changing its essentials. [Citing *Treatises on Civil Government,* book 2, sec. 57.]

"'If liberty is a social conception,' says Hobhouse, 'there can be no liberty without social restraint. For any one person, indeed, there might be a maximum of liberty if all social restraints were removed. Where physical strength alone prevails the strongest man has unlimited liberty to do what he likes with the weaker; but clearly the greater the freedom of the strong man, the less the freedom of the weaker. What we mean by

liberty as a social conception is a right to be shared by all members of society, and very little consideration suffices to show that, in the absence of restraints enforced on or accepted by all members of a society, the liberty of some must involve the oppression of others. . . . Excess of liberty contradicts itself. In short there is no such thing; there is only liberty for one and restraint for another.'"

And at pages 97-99 he continues:

"Bills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise. * * * Liberty became identified with the reign of law. 'Freedom of men under government,' says Locke, 'is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it.' The individual may not be singled out from among his fellows, and made the victim of the shafts of malice. Those who are put over him 'are to govern by promulgated established law, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.'

"Up to this, there is no restraint upon the scope or force of law so long as it be law, i. e., so long as it be general or equal, a rule as contrasted with an 'extemporary decree.' Liberty means more than this, however, as a concept of social science. It has come to mean more, at least in our own system, as a concept of constitutional law. The concept in our constitutional development has undergone a steady and highly significant development. The individual may not only insist that the law which limits him in his activities shall

impose like limits upon others in like circumstances. He will also be heard to say that there is a domain of free activity that may not be touched by government or law at all, whether the command be special against him or general against him and others. By express provision of the constitution, he is assured freedom of speech and freedom of conscience or religion. These latter immunities have thus the sanctions of a specific pledge, but they are merely phases of a larger immunity which finds expression in the comprehensive declaration that no one shall be deprived of liberty without due process of law. Such at least appears to be the more recent doctrine of the court that speaks the final word. Apart from any enumerated phase of liberty and beyond it, this declaration gives immunity against 'the play and action of purely personal and aribtrary power.' What is personal and arbitrary in mandate and restraint does not gain rationality and coherence because it takes the form of statute. The legislature does not speak with finality as to the measure of its own powers. The final word is for the courts."

Holmes, J., dissenting in *Abrams* v. *United States,* 250 U. S. 616, said:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your

premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be externally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. • • • "

From *Poulos* v. *State of New Hampshire*, 345 U. S. 395, per Reed, J., we quote:

"The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a nonsequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable

nondiscriminatory regulation by governmental authority that preserves peace, order and tranquillity without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion. When considering specifically the regulation of the use of public parks, this Court has taken the same position. See the quotation from the Hague case below and Kunz v. People of State of New York, 340 U. S. 290, 293-294; Saia v. People of State of New York, 334 U. S. 558, 562. In these cases, the ordinances were held invalid, not because they regulated the use of the parks for meeting and instruction but because they left complete discretion to refuse the use in the hands of officials. 'The right to be heard is placed in the uncontrolled discretion of the Chief of Police.' 334 U. S. at page 560, * * *' [W]e have consistently condemned licensing systems which vest in an administrative officials discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. 340 U. S. at page 294, * * *

"There is no basis for saying that freedom and order are not compatible. That would be a decision of desperation. Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference. * * * "

In *Herndon* v. *Lowry,* 301 U. S. 242,[8] and *Freedman* v. *Maryland,* 380 U. S. 51, the court refers in effect to the

[8] "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. * * * "

preferred position of First Amendment rights of freedom of expression. *Thomas* v. *Collins,* 323 U. S. 516. This priority is also used in *Hague* v. *Committee,* supra. *Edwards* v. *South Carolina,* 372 U. S. 229, and *Cox* v. *Louisiana,* 379 U. S. 536, are recent examples of this formulation.

In our constitutional law freedom of expression can rarely be fettered by a prior restraint on its exercise. Blackstone, Comm. iv., 151, et seq., aptly said:

> "• • • The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published. • • •"

Moreover, abuse of free speech is tolerated more: the stifling is a worse mischief. *Freedman* v. *Maryland,* supra.

Whether we concede that the appellant did or did not participate in a "procession" or "parade," undisputedly he was arrested while walking on a sidewalk. Immediately beforehand he had participated, from aught that appears, in an orderly and presumably lawful assembly.

By merely forbidding citizens to go to (or from) the place of assembly, the right of peaceable assembly could easily be thwarted. Again we note Blackstone, Comm. i, 134:

> "• • • This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. • • •"

Also, the constitutional protection from unreasonable seizures applies to a seizing of the person. *Ex parte Burford*, 3 Cranch 448 (1806).

Hence, we consider ourselves bound to examine §1159, supra, giving preference (1) to the constitutional rights of free expression (e. g., free speech, publication) and of free assembly; and (2) to the implicit right to use the sidewalks for walking.

It is the recognition and regulation of this latter right as being nonexclusive which causes difficulty in legislating and in judicial review of the legislator's choice. This enters into two enquiries: the extent of the power available to regulate and the mode of its exercise.

IV.

Police Power.

Code 1940, T. 62, §654, relating solely to Birmingham, provides:

> "§654. The city shall have full, complete, unlimited, and continuous power and authority, from time to time, to adopt ordinances and regulations not inconsistent with the laws of the state and the federal and state Constitutions to carry into effect or discharge the powers and duties conferred by law upon the city, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, orders, comfort, and convenience of the inhabitants of the city, and to prevent and punish injuries and offenses to the public therein, and to prevent conflict and ill feeling between the races in the city by making provisions for the use of separate blocks or parts of blocks for resi-

dences, places of abode, and places of assembly by the different races,[9] and to prevent evasions and punish violations of the ordinances and resolutions of the city, and to compel obedience thereto by fine not exceeding one hundred dollars and by imprisonment or hard labor not exceeding six months, one or both, and by revocation of license granted by such municipality upon conviction in the recorder's court for violation of any of said ordinances; provided, however, that this section shall not be construed to authorize the forfeiture of franchises granted by state laws or city ordinances without appropriate legal proceedings; and to the ends set out in this section the full, complete, and unlimited police powers possessed by the state of Alabama shall be had as though specifically and in detail set out in this section, in so far as it is possible for the legislature of Alabama under the Constitution of Alabama and of the United States to delegate such powers, it being expressly declared that nothing contained herein shall be construed as a limitation of or restriction on the police powers granted to the city under general or special laws."

The general municipal law, Code 1940, T. 37, §455, reads:

"§455. Municipal corporations may, from time to time, adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this title, and pro-

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[9] *City of B'ham.* v. *Monk,* 185 F. 2d 859 (B'ham. zoning ordinance); *Buchanan* v. *Warley,* 245 U. S. 60 (1917) (Louisville, Ky., ordinance); *Harmon* v. *Tyler,* 273 U. S. 608 (1927) (New Orleans ordinance); *City of Richmond* v. *Deans,* 281 U. S. 704 (1930) Richmond, Va., ordinance). See also *Robinson* v. *Florida,* 375 U. S. 918.

vide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and enforce obedience to such ordinances by fine not exceeding one hundred dollars, and by imprisonment or hard labor not exceeding six months, one or both."

Police power, in 16 Am. Jur. 2d, Constitutional Law, §262, is described (in part) thus:

"While it is generally recognized that it is very difficult and practically impossible to give an exact definition of the police power, many attempts have been made. There is no consensus in favor of any of them, but these definitions are of considerable value as indicating the breadth and scope of this power.

"The expression 'police power,' although capable of use, and sometimes used, in a restricted sense, is frequently used very broadly to include all legislation and almost every function of civil government. Thus, it has been stated that the police power in effect sums up the whole power of government, and that all other powers are only incidental and ancillary to the execution of the police power; it is that full, final power involved in the administration of law as the means to the attainment of practical justice. And it has been said that the power is only another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, that it is the vast residual power of the state, and that it comprises that portion of the sovereignty of the state which is not surrendered by the terms of the Federal Constitution to the federal government.

"Blackstone defines police power as 'the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. Many cases, employing the language of Chief Justice Shaw, define it as 'the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.'"

Knight, J., in *State* v. *Kartus,* 230 Ala. 352, 162 So. 533, said:

"No one, at this time, we take it, would have the temerity to undertake to define the 'police power' of a state, or mark its limitations. * * *"

In *Hawkins* v. *City of Birmingham,* 248 Ala. 692, 29 So. 2d 281, Foster, J., said of T. 62, §654, supra (at p. 696): "This power is of course subject to be controlled." See also *City of Birmingham* v. *Birmingham Business College, Inc.,* 256 Ala. 551, 56 So. 2d 111.

Concededly, if the Legislature confers the charter power, a city or town may ordain regulations for the use of its streets and sidewalks. This power cannot, however, extend beyond constitutional bounds.

We are presented with two conflicting concepts. *First,* the use of public ways is subject primarily to going to and

fro of the public generally, afoot on sidewalks, with the roadway mainly reserved for wheeled traffic.[10]

Secondly, free speech, the communication of ideas, and free assembly, locomotion, inhere in the use of public places.

At the outset, we believe that the early case of *Commonwealth* v. *Davis,* supra, treating public property as subject to power to be used exclusively in the will of public authorities as if they were private owners is no longer valid. *Thomas* v. *Casey,* 121 N. J. L. 185, 1 A. 2d 866, rested on *Davis. Hague* v. *Committee,* supra, disapproved.

Police power[11] has been held vital for society to hold together: the contrast often is given of anarchy, and not the philosophic nirvana-like anarchy. Law and order for the protection of the weak from the strong is in contrast to the law of the jungle.

Emergencies, however, do not create powers: rather they furnish the occasion for the exercise of those conferred. Constitutional law cannot raise itself by its own bootstraps. *Homebuilding & Loan Assoc.* v. *Blaisdell,* 290 U. S. 398.

We do not doubt that §654 of T. 62 and §455 of T. 37, supra, confer on the city the power to regulate the use of public streets and places in the interest of accommodating conflicting claims of vehicles and pedestrians. Yet, in so resolving traffic problems the State and Federal Constitu-

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[10] "Any person engaged in a lawful pursuit has the right to pass on the public streets without interference, threats or intimidation." *Russell* v. *International Union,* 258 Ala. 615, 64 So. 2d 384. Nor is a pedestrian vis a vis a street railway running at grade to be deemed a trespasser. *Birmingham, Ensley, etc., R.R. Co.* v. *Stagg,* 196 Ala. 612, 72 So. 164.

[11] *Jacobson* v. *Massachusetts,* 197 U. S. 11 (smallpox vaccination); *Lieberman* v. *Van de Carr,* 199 U. S. 552 (milk delivery permit).

tions impose a duty to recognize liberty within a concept of an ordered society.

Basically, we consider that a municipality or a state legislature can require that a permit be first obtained to use the vehicular portion of a street for a parade or procession. Moreover, if the movement overflows onto the pedestrian sidewalk the same ends for control would seem to obtain.

As to a group walking on the sidewalk of a dedicated street, spaced apart, not blocking others from going to or fro, nor interfering with cross traffic (either pedestrian or vehicular) and demeaning themselves in an orderly and peaceable fashion, we consider there is such a fundamental right to so use the sidewalk that a permit would be the exception. Thus, the City in such a case would have the burden of proving (beyond a reasonable doubt) that (1) no permit was issued and that (2) an abridgement of the rights (either of expression or of locomotion) is warranted by overriding considerations.

Picketing, as currently regulated by spacing the picketers (both as to fore and aft and abreast), keeping them circulating and yielding the right of way to passers-by, affords a useful illustration.

Ordinarily, a court in reviewing legislation will look at the remedy with the favoring intendment that all rationally connected mischiefs passed through the collective mind of the lawmakers. Thus the inhibition of conduct—though sometimes partly innocent—can find support in the state's police power if aimed at a substantial evil.

Nevertheless, this balancing in First Amendment cases finds the scales weighted in the beginning in favor of the freedom which is sought to be restrained. As Rutledge, J., said in *Thomas* v. *Collins*, supra, at 529-530:

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Prince* v. *Massachusetts,* 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction

> with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *De Jonge* v. *Oregon,* 299 U. S. 353, 364, and therefore are united in the First Article's assurance. * * *"

We conclude that the reference in §1159 to the factors ("public welfare, peace, safety, health, decency, good order, morals or convenience") are but facets of the police power conferred on the City to enable it to establish and maintain itself as a viable entity. These elements are only the source to which the City may look in choosing the means toward a legitimate end. Police power is not an ever ready deus ex machina.

The enquiry next devolves on whether the City's legislative body has established an appropriate means to prevent abuses in the streets.

V.

Does §1159 Impose an Invidious Prior Restraint?

This question we must answer in the affirmative.

In *Saia* v. *New York,* 334 U. S. 558, the court declared a sound truck permit ordinance void on its face.

Niemotko v. *Maryland,* 340 U. S. 268:

> "This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places. * * * In those cases this Court condemned statutes and ordinances which required that

permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, *and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid.* * * *" (Italics added.)

Kunz v. *New York,* 340 U. S. 290:

"* * * We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

"In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague* v. *C. I. O.,* 307 U. S. 496, 515 (1939). Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. * * *"

American Civil Liberties Union v. *Town of Cortlandt*, 109 N. Y. S. 2d 165:

"Although in most cases where legislative acts have been struck down, the discretion in administering the licensing power has been placed in administrative official, the rule is no different where the legislative body reserves for itself the administration of the licensing power. In the case of Niemotko v. Maryland, 340 U. S. 268, * * * applications for a license were customarily made first to the Police Commissioner, and, if refused by him, application was then made to the City Council. Even that body was not permitted to have unlimited and uncircumscribed discretion. It is that type of discretion that has been here vested and, of necessity, this Court must declare the 'Permit Ordinance' unconstitutional."

Cox v. *Louisiana*, supra:

"This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York*, supra, at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws. See *Niemotko* v. *Maryland*, supra, at 272, 284; cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and

which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

"It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" . . . [and with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . . "' *Cox* v. *New Hampshire,* supra, at 576. See *Poulos* v. *New Hampshire,* supra.

"But here it is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings in as unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment. It follows, therefore, that appellant's conviction for violating the statute as so applied and enforced must be reversed."

The only administrative standards are those of the City's basic power virtually in its entirety. The expressions used are couched in the distributive. Hence, a single

reference to the Commission's opinion of the public welfare, or of peace, or of safety, or of health, or of decency, or of good order, or of morals, or of convenience would suffice for a permit refusal.

> "• • • [The police power of a state] must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."—*Treigle* v. *Acme Homestead Ass'n,* 297 U. S. 189.

VI.

§1159 Lacks Ascertainable Standards

If the cohesiveness of the fifty-two pedestrians in having a common starting point and apparent common destination were held to constitute a procession, nevertheless we should be constrained to hold the foregoing ordinance invalid for the lack of ascertainable constitutional standards in determining administratively when a permit shall be granted. *Baines* v. *City of Danville,* 337 F. 2d 579.

So far as we can find, §1159 has been reviewed directly only once by appellate courts. In *Primm* v. *City of Birmingham,* supra, we held the City had singled out the defendant without showing any nexus between him and any other pedestrians. There, Johnson, J., said:

> "To hold that the acts of • • • Primm were violative of the above parading ordinance would, in effect, require a parading permit to be procured by every conventioneer wearing a large political button attempting to cross a street, or by every sporting enthusiast waving a pennant that denotes his loyalties while proceeding to the field of encounter. • • •"

In *Baines* v. *City of Danville,* supra, approving reference is made to the Model Ordinance Regulating Parades drafted by the National Institute of Municipal Law Officers.

Hence, we have set out in parallel columns an analysis of the salient features of §1159 and the NIMLO Model:

Birmingham 1944 Code, §1159, 2d Par., supra	*NIMLO Model*
I. Form of Application	I. §10-304
A. Written.	A. On forms provided by Chief of Police.
B. Information.	B. Information.
1. No. of persons, vehicles and animals.	"(a) The name, address and telephone number of the person seeking to conduct such parade;
2. Purpose.	"(b) If the parade is proposed to be conducted for, on behalf of, or by an organization, the name, address and telephone number of the headquarters of the organization, and of the authorized and responsible heads of such organization;
3. Route (or place of demonstration).	
4. Time not required to be given.	"(c) The name, address and telephone number of the person who will be the parade chairman and who will be responsible for its conduct;
	"(d) The date when the parade is to be conducted;

Birmingham 1944 Code, §1159, 2d Par., supra

NIMLO Model

"(e) The route to be traveled, the starting point and the termination point;

"(f) The approximate number of persons who, and animals and vehicles which, will constitute such parade; the type of animals, and description of the vehicles;

"(g) The hours when such parade will start and terminate;

"(h) A statement as to whether the parade will occupy all or only a portion of the width of the streets proposed to be traversed;

"(i) The location by streets of any assembly areas for such parade;

"(j) The time at which units of the parade will begin to assemble at any such assembly area or areas;

"(k) The interval of space to be maintained between units of such parade;

"(l) If the parade is designed to be held by, and on behalf of or for, any person other than the applicant, the applicant for such permit shall file with the Chief

Birmingham 1944 Code, §1159, 2d Par., supra	*NIMLO Model*
	of Police a communication in writing from the person proposing to hold the parade, authorizing the applicant to apply for the permit on his behalf.
	"(m) Any additional information which the Chief of Police shall find reasonably necessary to a fair determination as to whether a permit should issue.
	C. Late application: ..... days before proposed parade.
	D. Fee: $ .....
II. Exceptions	II. Exceptions §10-303
A. Funeral processions only exception.	A. Funeral processions.
	B. Students going to and from classes, etc.
	C. A governmental agency acting within scope.
III. Standards for Issuance	III. Standards §10-305
A. "The commission shall grant * * * and prescribing the streets[12] * * * unless	"SECTION 10-305. *Standards for Issuance.* The Chief of Police shall issue a permit as provided for hereunder when, from a con-

[12] §10-308 of NIMLO Model empowers the Chief of Police to issue an alternate permit, i. e., for a different time or route from that proposed.

Birmingham 1944 Code, §1159, 2d Par., supra

in its judgment:" the permit should be refused because of any one or more of the following:

1. Public welfare;
2. [Public] peace;
3. [Public] safety;
4. [Public] health;
5. [Public] decency;
6. [Public] good order;
7. [Public] morals; or
8. [Public] convenience.

NIMLO Model

sideration of the application and from such other information as may otherwise be obtained, he finds that:

"(1) The conduct of the parade will not substantially interrupt the safe and orderly movement of other traffic contiguous to its route;

"(2) The conduct of the parade will not require the diversion of so great a number of police officers of the City to properly police the line of movement and the areas contiguous thereto as to prevent normal police protection to the City;

"(3) The conduct of such parade will not require the diversion of so great a number of ambulances as to prevent normal ambulance service to portions of the City other than that to be occupied by the proposed line of march and areas contiguous thereto;

"(4) The concentration of persons, animals and vehicles at assembly points of the parade will

Birmingham 1944 Code, §1159, 2d Par., supra

NIMLO Model

not unduly interfere with proper fire and police protection of, or ambulance service to, areas contiguous to such assembly areas;

"(5) The conduct of such parade will not interfere with the movement of fire-fighting equipment enroute to a fire;

"(6) The conduct of the parade is not reasonably likely to cause injury to persons or property, to provoke disorderly conduct or create a disturbance;

"(7) The parade is scheduled to move from its point of origin to its point of termination expeditiously and without unreasonable delays enroute;

"(8) The parade is not to be held for the sole purpose of advertising any product, goods or event, and is not designed to be held purely for private profit."

IV. Appeal Procedure:

None, except to courts, presumably by way of mandamus with alternative prayer for certiorari.

IV. Appeal Procedure: §10-307

"SECTION 10-307. Appeal Procedure. Any person aggrieved shall have the right to appeal the denial of a parade permit to the City Council. The appeal shall

Birmingham 1944 Code, §1159, 2d Par., supra

NIMLO Model

be taken within ..... days after notice. The City Council shall act upon the appeal within ..... days after its receipt."

A keystone illustration of the canon of strict (or at least literal) construction of a penal law is found in *McBoyle* v. *United States,* 283 U. S. 25, at 27. There the government tried to apply the Dyer Act to punish theft of an airplane. Holmes, J., concluded:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. *United States* v. *Thind,* 261 U. S. 204, 209.".

And from a Massachusetts case we quote:

> "• • • Prima facie, mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child. This the Commonwealth concedes. Under the

ordinance, such conduct continues conditionally lawful subject to a direction to move on by a police officer followed by unreasonable failure to comply and the expiration of seven minutes. Not all idling is prohibited, but only that which is unreasonable. The vice of the ordinance lies in its failure to prescribe any standard capable of intelligent human evaluation to enable one chargeable with its violation to discover those conditions which convert conduct which is prima facie lawful into that which is criminal. A 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Connally v. General Construction Co., 269 U. S. 385, 391 * * *."—*Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666.

Connally v. *General Const. Co.*, 269 U. S. 385, is probably the most frequently cited case in this area:

"* * * The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

In *United States* v. *Cardiff*, 344 U. S. 174, Douglas, J., said:

"All that the Department says may be true. But it does not enable us to make sense out of the statute. Nowhere does the Act say that a factory manager must allow entry and inspection at a reasonable hour. Section 704 makes entry and inspection conditioned on 'making request and obtaining permission'. It is that entry and inspection which §301 (f) backs with a sanction. It would seem therefore on the face of the statute that the Act prohibits the refusal to permit inspection only if permission has been previously granted. Under that view the Act makes illegal the revocation of permission once given, not the failure to give permission. But that view would breed a host of problems. Would revocation of permission once given carry the criminal penalty no matter how long ago it was granted and no matter if it had no relation to the inspection demanded? Or must the permission granted and revoked relate to the demand for inspection on which the prosecution is based? Those uncertainties make that construction pregnant with danger for the regulated business. The alternative construction pressed on us is equally treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime. However we read §301 (f) we think it is not fair warning (cf. *United States* v. *Weitzel,* 246 U. S. 533, *McBoyle* v. *United States,* 283 U. S. 25) to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81) may

be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon* v. *Lowry*, 301 U. S. 242."

This general rule of strict construction of penal laws began early in our courts, both state and Federal. Thus, Washington, J., in *United States* v. *Sharp* (1815), Pet. C. C. 118, at 122, said:

"* * * Laws which create crimes ought to be so explicit in themselves or by reference to some other standard, that all men subject to their penalties may know what acts it is their duty to avoid. * * *"

See also *United States* v. *Lacher*, 134 U. S. 624; *United States* v. *Brewer*, 139 U. S. 278; cf. *Nash* v. *United States*, 229 U. S. 373—"restraint of trade" has an ascertainable common law meaning. *Eubank* v. *Richmond*, 226 U. S. 137; *Panhandle Co.* v. *Highway Comm.*, 294 U. S. 613.

By 1914 we find the court subsuming the rule into its concept of due process and under the Fourteenth Amendment rather than the Sixth. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, struck down a state anti-trust law which used "real value." Cf. Kentucky Constitution 1891, §198.

In *Winters* v. *New York*, 333 U. S. 507, Reed, J., said:

"* * * The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The

crime 'must be defined with appropriate definiteness.' *Cantwell* v. *Connecticut*, 310 U. S. 296; *Pierce* v. *United States*, 314 U. S. 306, 311. * * * .

* * * * *

"The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. * * *

"* * * But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stores 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passion,' we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications.

No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crime of violence against the person. No conspiracy to commit a crime is required. See *Musser* v. *Utah,* 333 U. S. 95. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. • • •

• • • • •

"• • • Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry,* 301 U. S. 242, 259."

In the "Miracle" censorship case, *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, the word "sacrilegious" (contrasted with "blasphemous") was held to be fatally vague. Clark, J., there said:

"• • • That statute makes it unlawful 'to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel [with specified exceptions not relevant here], unless there is at the time in full force and effect a valid license or permit therefor of the education department . . .' The statute further provides:

"'The director of the [motion picture] division [of the education department] or, when authorized by the re-

gents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. * * *

* * * * *

"* * * Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the 'sacrilegious' test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

"Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We

hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'"

Reference may also be had to the following articles: Amsterdam, *The Void-for-Vagueness Doctrine,* 109 U. Pa. L. Rev. 67; Aigler, *Legislation in Vague or General Terms,* 21 Mich. L. Rev. 831; Freund, *Use of Indefinite Terms in Statutes,* 30 Yale L. J. 437; Hall, *Strict or Liberal Construction of Penal Statutes,* 48 H. L. Rev. 748; Hall and Seligman, *Mistake of Law and Mens Rea,* 8 U. Chi. L. Rev. 641; Note, *Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Proces,* 38 H. L. Rev. 963; Note, *Indefinite Criteria of Definiteness in Statutes,* 45 H. L. Rev. 160; Note, *Void for Vagueness: An Escape from Statutory Interpretation,* 23 Ind. L. J. 272; Horack, *Constitutional Liberties and Statutory Construction,* 20 Iowa L. Rev. 448; Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 Vand. L. Rev. 531; Morris, Case Note, 26 Tex. L. Rev. 216 and Case Note, 33 Va. L. Rev. 203.

Nor is this principle a stranger to our jurisprudence. *Carter,* 243 Ala. 575, 11 So. 2d 764; *Kahalley,* 254 Ala. 482, 48 So. 2d 794.

Mr. Justice Simpson well stated the rule in *Bolin,* 266 Ala. 256, 96 So. 2d 582, where the court on certified question held the stink bomb law void for vagueness. There we find:

"If the provision can be sustained as constitutional it must be under the police power of the state which authorizes the imposition of reasonable regulations in the interest of public health, public morals, public safety or the general welfare. Looking to one of the

earliest authorities, Blackstone defines this power to be 'the due regulation and domestic order of the kingdom: whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious and inoffensive in their respective stations.' 4 Blackstone Commentaries 162.

"Mr. Justice Holmes, speaking for the Supreme Court of the United States in Noble State Bank v. Haskell, 219 U. S. 104, 111, observed:

" 'It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 17 S. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'

* * * * *

"It is also settled law that 'In enacting a criminal statute, there is an obligation on the State to so frame it that those who are to administer it and those to whom it is to be administered may know what standard of conduct is intended to be required and legislation may run afoul of the due process clause because of a failure to set up any sufficient guidance to those who would be law-abiding, or to advise a defendant of the nature and cause of an accusation he is called on to answer, or to guide the courts in the law's enforcement.' Kahalley v. State, 254 Ala. 482, 483, 48 So. 2d 794, 795; Seals v. State, 239 Ala. 5, 194 So. 682; Standard Oil Co. v.

State, 178 Ala. 400, 59 So. 667; Carter v. State, 243 Ala. 575, 11 So. 2d 764.

"And a person is not required to speculate as to the meaning of a statute at the peril of his freedom. Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888. The intent of the legislature must appear from the face of the statute. Standard Oil Co. v. State, supra."

In the same year, 1957, in *State* v. *Homan*, 38 Ala. App. 642, 92 So. 2d 51, where a trial court had held Code 1940, T. 41, §221, subdiv. 3, unconstitutional, we reversed. The opinion compasses a number of Alabama cases both of imprecise words and constitutional holdings:

"We are cited to the peeping tom case, Kahalley v. State, 254 Ala. 482, 48 So. 2d 794, 795. The gist of the offense there was for any male person to go 'near and stare * * * into any room * * * not his own or under his control, which is occupied by any female person * * *.' This case in turn is bottomed on the Fourteenth Amendment to the Federal Constitution via Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, and other cases therein cited.

"And from the Kahalley decision sprang Connor v. City of Birmingham, 36 Ala. App. 494, 60 So. 2d 474. The offense there was that no two persons of opposite sex (except man and wife and parent and minor child) shall occupy jointly and privately any room in any lodging house, hotel, etc.

"These cases illustrate what, in the absence of concepts of due process, would nevertheless be obnoxious crimi-

nal legislation. Thus in Kahalley the fallacy is exposed by the question, 'How far is near?' In Connor the language, though unambiguous, is so broad and sweeping as to raise a presumption that the legislator would not have so intended unless he had added all inclusive words, and absent the all inclusive words the courts would not attempt to re-legislate, 36 Ala. App. at page 499, 60 So. 2d at page 477.

"Subdivision 3 of Section 221 [T. 41], supra, is severable * * *. * * * we are of the opinion that there is no denial of due process of law nor is the language of the subdivision so vague as to be meaningless. There are no imprecise words such as 'profiteering', 'necessity of life', State v. Goldstein, 207 Ala. 569, 93 So. 308, 'profit, gain or advantage, unusual in the ordinary course of legitimate business', State v. Skinner, 20 Ala. App. 204, 101 So. 327, 329, or 'near', Kahalley v. State, supra. See also Parisian Co. v. Williams, 203 Ala. 378, at page 383, 83 So. 122 at page 127. * * * "

Since the only stated standards for refusing a permit are those of welfare, peace, safety, health, decency, good order, morals or convenience, we—in addition to overbroadness—find these words, as related to a parade, procession or demonstration, either sufficiently lacking in preciseness or without a settled applicable common law meaning.

For example, in *Hague* v. *Committee,* supra, Roberts, J., aptly pointed out that peace on the streets could easily be achieved by suppression.

In the context of long drawn out resort to congested courts for relief, these stated "standards"—truly only sources of power, not means to an end—show §1159 to be void on its face.

VII.

§1159 Is Void as Applied

Yick Wo v. *Hopkins,* supra, held that, though a San Francisco ordinance aimed at fire hazards had a valid surface wording, yet its employment against only Chinese laundrymen was discriminatory.

Here we have no direct evidence of any other persons being charged with a breach of §1159 on the same occasion as that of instant concern. Nevertheless, the borderline case made here against Shuttlesworth, coupled with even less plausible presentations reviewed in *Primm* v. *City of Birmingham,* supra, and in two other cases decided here on the authority of *Primm,* at the same time as *Primm,* constitute a pattern of enforcement.

In addition to facts listed in the quotation from Judge Johnson's opinion in *Primm* (set out hereinabove), we excerpt also from the evidence of one of the arresting officers:

> "Q. * * * Were you informed by anyone that no permits had been issued for any such demonstrations? A. Yes, sir. At roll call before we came to work they read out this ordinance number to us and said no one had received any permits to hold any kind of demonstrations downtown and they read out the ordinance to us."

And of similar import from *Bentley* v. *City of Birmingham,* 6 Div. 938, decided on authority of *Primm,* we extract:

> "Q. Is it a fact, Officer, that the fact that some people might come down in the downtown area with signs was discussed that morning at Police Headquarters? A. It was.

"Q. And was the section which Ann Bentley is charged with discussed also at that time? A. Yes, it was.

"Q. Who did you discuss it with, Officer? A. I believe that the Sergeant read—or, either the Captain read out the ordinance and said it was a violation.

"Q. Could you tell us just what he said with reference to this ordinance?

"Mr. Walker: We object. Well, go ahead and answer that.

"A. If I remember correctly, at roll call they read a lot of different things, read auto stolen reports, and read a lot of things that come in there, and if I remember correctly, I believe they read out the ordinance and said carrying signs would be prohibited.

"Q. Did they describe how big the sign had to be? A. They did not.

"Q. Was there anything else said there that you remember? A. Not that I recall.

"Q. Did they describe what type of conduct other than carrying signs would constitute an offense? A. I don't recall any mention of conduct.

* * * * * *

"Q. All that you know about it is that she had the sign on, she was not in the company of anybody, she was walking across the street, and in about six seconds she was arrested? A. That is correct.

"Q. She didn't create any disturbance, or block the street, or anything else other than that, is that right? A. She did not.

"Q. Didn't endanger anybody's safety, so far as you know? A. She did not."

Officer ——— (on cross):

"Q. Now, I believe you stated that you were at the roll call that morning when they gave you orders about making arrests for violation of 1159? A. They didn't say make an arrest, they just told us what the ordinance number was in case someone was downtown with signs on.

"Q. Wearing signs? A. But, they didn't actually say go out and get them.

"Q. Well, now, what were your specific orders with respect to people wearing signs downtown, if anything? A. I don't recall any particular orders. They just notified us of what the situation—of what the City Code was pertaining to such an incident.

"Q. And your understanding was that you were to arrest anybody with a sign on? A. My understanding is to arrest anybody violating the City Code to my knowledge.

"Q. We are not asking about the other sections in the City Code, we are asking specifically about 1159. Did you have specific orders to arrest anybody who was wearing a sign?

"Mr. Walker: We object to that, Your Honor.

"Mr. Shores: Your Honor, we are trying to find out whether or not he was given instructions to cover that these individuals blocked the street, or whether the individuals were creating a disturbance with signs, or just what type of sign.

"Mr. Walker: Your Honor, we are not trying the defendant on what the officer thought, or what orders he was under. The only evidence that will be considered is the evidence admitted here in this court room, and whether the officer was under instructions, or acted even without any instructions, that can make no—have no bearing on the case, because it will be decided from the evidence that comes from the witness stand.

"Mr. Shores: But, since he did say he did have some instruction, the law was read to him, we want to question him about those instructions. They are the ones who brought that out. We didn't know about they had a little meeting and discussed what they were to do, so that is what we are trying to find out, Your Honor.

"The Court: You may ask him.

"Q. • • • were you given any instructions or any orders as to what type of signs a person must be wearing before you could make an arrest? A. No, I don't recall any such orders.

"Q. They didn't tell you how large the sign was to be, or how small? A. No, there was no mention as to size.

"Q. Well, specifically what was said at this roll call with respect to 1159? A. I don't remember the exact conversation. All I know they read out—they said Article 1159 will cover any demonstrations, or parades, or carrying signs downtown. They didn't mention what kind of—what the signs were to say, or what size, or what color or anything of that nature.

"Q. In other words, they gave you instructions coupled with that reading as to what it would require

to make the arrest? One of the requirements was that a person must have a sign on? A. That's right.

"Q. And that was all, and that is all you arrested them for, is that correct? A. That is correct."

For a case to reach here after a city arrest, it must go through two tiers of judicial proceedings: *first,* a trial before the city recorder; and, *second,* on appeal from a conviction, a trial de novo in the circuit court.

Trial in the circuit court can only be had on the city attorney's filing (unless waived) of a new complaint.

Accordingly, a case might come before the recorder without counsel for the city being aware of the prosecution in detail before trial. In the circuit court, the city's attorney, under his client's instruction, is an indispensable actor.

This pattern of enforcement exhibits a discrimination within the rule of *Yick Wo* v. *Hopkins,* supra.

IX.

There Was Insufficient Evidence to Sustain the Charge

In a city ordinance prosecution, the city must sustain its case by proof to the same degree required in case of an indictable offense, to convince the jury from the evidence beyond a reasonable doubt.

Here, we consider the proof weighed in this scale fails to show a procession which would require, under the terms of §1159, the getting of a permit.

No evidence came in as to whether or not the pedestrians in question—fifty-two in number, about a football squad with attendants—acted as a cohesive unit as a military group would march.

The City failed to show whether or not other pedestrians were run off the sidewalk, blocked either in access, process or transit. No evidence showed whether or not the group disobeyed traffic lights or officers directing crossings. There was no evidence of jaywalking or wandering onto the roadway.

Were it not for the singing and clapping[13] and some spurts of activity indicative of the appellant being a puisne leader under Dr. King, in conjunction with the broad definition of "street" in the City Code as embracing the public sidewalk alongside, we might not have gone to such lengths of demonstration.

The Georgia Court of Appeals, in *Montgomery* v. *Mayor, etc., of Athens,* 105 Ga. App. 57, 123 S. E. 2d 339, where a number of men (bearing signs with slogans with scriptural citations) picketed the University of Georgia campus while the Attorney General of the United States spoke within, had this to say:

> "'The undisputed facts in this case show that the petitioners did not obstruct or interfere with either vehicular traffic or pedestrian traffic and were not engaged in any activity which would require a police escort to direct traffic in conjunction therewith. Not only did they not unreasonably burden and interfere with the normal use of the streets by the public in the City of Athens but the undisputed facts show that their activity did not burden or interfere with the normal use of the streets in any manner whatsoever. We are therefore of the opinion that the activity of the petitioners on this occasion did not constitute a

[13] *State* v. *Hughes,* 72 N. C. 25.

parade as contemplated by the ordinance or by the usually accepted definition of a parade. • • •"

Here, the trial court erred in overruling the appellant's motion to exclude the evidence for want of a prima facie case.

X.

Limitation of Opinion

When this case arose, *Cox* v. *Louisiana*, supra, was not announced. *Freedman* v. *Maryland*, supra, was waiting in the wings. The trial judge rested on a more vigorous *Cox* v. *New Hampshire*, supra.

We emphasize that we have only before us a walking on city sidewalks. In the use of the roadway probably less stringent standards of construction would prevail against the prosecutor.

Moreover, we do not doubt the potentiality of the City's adopting an ordinance without suppressing free expression or locomotion. We quote from *Cox* v. *Louisiana*, supra, per Goldberg, J.:

"• • • The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public conven-

ience in the interest of all, *and not susceptible to abuses of discriminatory application,* cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. * * *

* * * * *

"We have no occasion in this case to consider the constitutionality of the uniform, consistent, and non-discriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings. * * *" (Italics added.)

Ordered liberty is the end for which we enforce laws, not the wish for self-immolation. On the bones of the martyrs to his tyranny man has never built a lasting system of Law.

Lord Acton in 1877 perceived the interplay between rights and duties, between competing claims of rights—saying:

"* * * At all times sincere friends of freedom have been rare, and its triumphs have been due to minor-

ities, that have prevailed by associating themselves with auxiliaries whose objects often differed from their own; and this association, which is always dangerous, has been sometimes disastrous, by giving to opponents just grounds of opposition, and by kindling dispute over the spoils in the hour of success. No obstacle has been so constant, or so difficult to overcome, as uncertainty and confusion touching the nature of true liberty. If hostile interests have wrought much injury, false ideas have wrought still more; and its advance is recorded in the increase of knowledge, as much as in the improvement of laws. The history of institutions is often a history of deception and illusions; for their virtue depends on the *ideas* that produce and on the *spirit* that preserves them, and the form may remain unaltered when the substance has passed away." (Italics added.)

X.

Conclusion

The appellant had standing to question the ordinance. *Staub* v. *Baxley*, supra; *Freedman* v. *Maryland*, supra.

We consider that (1) §1159 of the 1944 General Code of the City of Birmingham, certainly as to the use of sidewalks by pedestrians, is void for vagueness because of overbroad, and consequently meaningless, standards for the issuance of permits for processions; (2) said §1159 has been enforced in a pattern without regard to even the meaning here claimed for by the City to such an extent as to make it unconstitutional as applied to pedestrians using the sidewalks; and (3) the City failed to make a case, under

the purported meaning of §1159, of there being a need for the appellant in this case to be covered by a permit to use the sidewalk in company with others.

Therefore, the judgment below is due to be reversed and the appellant is due to be discharged sine die.

REVERSED AND RENDERED.

JOHNSON, J. (dissenting):

The complaint filed in the circuit court by the City's attorney charges that appellant "did take part or participate in a parade or procession on the streets of the City without having secured a permit therefor from the commission, contrary to and in violation of Sec. 1159 of the General City Code of Birmingham of 1944."

The evidence, as introduced by the City, tended to show that during the afternoon of Friday, April 12, 1963, approximately 52 persons, most of whom were Negroes, departed from a church in the 1400 Block of 6th Avenue North in Birmingham, grouped "in formation" on the sidewalk in front of the church, and then walked "in formation" along the sidewalks for several blocks. Their route followed east from the church along 6th Avenue North to 17th Street, then south along 17th Street one block to 5th Avenue North, and then east again along 5th Avenue North towards 18th Street. They were stopped by a policeman in the middle of the block between 17th and 18th Streets. "Spectators" lining the route fell in behind and followed the group in formation as they passed by. This crowd of "spectators"—consisting of several hundred persons—did not walk in formation and had no discernible organization. There were also a number of photographers present. The appellant, who is a preacher, left the church with the peo-

ple who walked in formation. He was observed entering the church wearing a business suit, and when he left the church he was wearing a black shirt and "bluejean" trousers. Rev. Martin Luther King and Rev. A. B. Abernathy led the group in formation. They were dressed in attire similar to that worn by appellant. The group in formation sang and clapped hands as they proceeded along the sidewalk, but were otherwise orderly. No permit was issued for a parade or procession to be held on April 12, 1963. There is no evidence concerning whether anyone applied for such permit.

Police Officer R. N. Higginbotham, a witness for the City, was at 5th Avenue North and 18th Street when he first observed the alleged parade or procession. He testified that the group in formation turned on to 5th Avenue from 17th Street and proceeded east on the sidewalk on the north side of 5th Avenue, that this group was marching four to six abreast "all the way across the sidewalk", and that he stopped them in the middle of the block between 17th and 18th Streets. He stated that the crowd following the group in formation was in the center of the street, and also that he observed appellant in the group in formation, in the "third or fourth row back."

Police Officer Edward Ratigan, a witness for the City, testified that he followed the alleged parade or procession from the church on 8th Avenue to where it was stopped on 5th Avenue; that the group in formation consisted of 52 persons marching two abreast, approximately forty inches apart; and that this formation persisted until the group was stopped. He further stated that appellant was at no time in line with a partner in the marching group but was walking alongside the group talking to them, and giving them encouragement. Police Officer Herman Evers testi-

fied that appellant was "bounding from the front to the rear" of the marching group "waving his arms to come on, telling them to come on."

Appellant's evidence consists of the testimony of five witnesses, including himself. His evidence tends to show that approximately 52 persons left the church on 6th Avenue North and walked two abreast on the sidewalks for several blocks; that appellant left the church with the group and walked a few blocks in the same direction; that he was not walking with a partner in this group but was walking at times beside the group, counseling them to be quiet and orderly; that he also tried to prevent bystanders or spectators from joining the marching group; and that he left the scene before any of the group in formation was arrested. Appellant referred to the group in formation as "marchers."

Appellant contends that the court erred in overruling his motion to exclude the City's evidence because (1) there is no evidence of a parade or procession, (2) assuming arguendo there was a parade or procession, it occurred on the sidewalk and not in the streets as alleged in the complaint, and (3) there is no evidence that appellant took part or participated in such parade or procession.

The statute does not attempt to define a parade or procession. Parade is defined in Webster's New International Dictionary, Second Edition, as follows:

> "Any march or procession; esp. a formal public procession; the movement of any body marshalled in something like military order; as, a parade of firemen; a circus parade."

Procession is defined in Webster's New International Dictionary, Second Edition, as follows:

> "A group, esp. of persons or of vehicles containing persons, moving onward in an orderly, ceremonious, or solemn parade; as a religious procession; to go in procession to the capitol; to form a procession."

In *Cox* v. *New Hampshire,* 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, the Supreme Court of the United States had before it the question of whether a group of fifteen to twenty members of a religious sect marching along the sidewalk in single file carrying placards constituted a "parade or procession" within the meaning of a New Hampshire Statute prohibiting a parade or procession without a license. The question was answered in the affirmative by a unanimous court. Chief Justice Hughes, speaking for the court, stated:

> "There appears to be no ground for challenging the ruling of the state court that appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: 'It was a march in formation, and its advertising and informatory purpose did not make it otherwise . . . It is immaterial that its tactics were few and simple. *It is enough that it proceeded in an ordered and close file as a collective body of persons on the city streets.*" (Emphasis added.)

Here, the City's evidence establishes that a substantial number of persons, upon leaving the same church at the same time, gathered in formation in front of that church and while maintaining formation marched on the sidewalks along the streets for several blocks, two to six abreast. They were singing and clapping their hands. The group was led and directed by ministers or preachers. The march-

ers attracted a crowd of spectators, and some photographers. This evidence established, in my opinion, a common intent to march on the streets as an organized, collective body of persons. It was a movement of a body of persons marshalled in something like military order. It was a "parade or procession" within the meaning of Section 1159, supra.

Appellant's contention that the parade or procession did not occur in the street is without merit. A look at Section 2 of the General City Code of Birmingham of 1944 discloses an intent to treat sidewalks as part of the streets. Section 2 reads in part:

> "Sec. 2. Definitions and rules of construction.
>
> "In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise.
>
> * * * * *
>
> "Sidewalk: The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

In common parlance, a "sidewalk" is the part of a street assigned to the use of the pedestrians. *Smith* v. *City of Birmingham,* 42 Ala. App. 467, 168 So. 2d 35.

A parade or procession may be held on the sidewalk as well as that part of the street set aside for vehicular traffic. See *Cox* v. *New Hampshire,* supra. Sec. 1159, supra, prohibits a parade or procession on any portion of the street, including the sidewalk.

The evidence clearly establishes that appellant took part or participated in the parade or procession. If we reject the testimony of Officer Higginbotham to the effect that

appellant was in the group in formation, which I do not, the testimony of other police officers to the effect that appellant walked beside the marching group giving them instructions is sufficient to establish that he participated in the parade or procession. One who assumes duties similar to a drill sergeant in a military parade, as did appellant, takes part or participates in a parade or procession.

Appellant contends that Section 1159 "vests in the commission the power to restrain free expression without establishing reasonable standards for the use of such power," and therefore violates the First Amendment to the United States Constitution, which is protected against state action by the Fourteenth Amendment.

Although the right to engage in a parade is one phase of the exercise of the fundamental right of free speech and assembly, such right is subject to reasonable and non-discriminating regulation and limitation.

In *Cox* v. *New Hampshire,* supra, Chief Justice Hughes wrote:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintain public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote

the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * * As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

In *Kunz* v. *New York*, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 28, Mr. Justice Jackson wrote that "cities throughout the country have adopted the permit requirement to control private activities on public streets and for other purposes." Ordinances of this character have been in effect in most municipalities of Alabama for many years. The authority to enact such ordinances is given by Section 455, Title 37, and Section 654, Title 62, Code of Alabama 1940.

It is the duty of this Court not to strike down a city ordinance as unconstitutional if by a reasonable construction it can be given a field of operation within constitutional limits. See *City of Mobile* v. *Coffin*, 28 Ala. App. 243, 181 So. 795. Where an ordinance is susceptible of two constructions, one of which will defeat the ordinance and the other will support it, the latter construction will be adopted. *Birmingham Ry., Light & Power Co.* v. *Kyser*, 203 Ala. 121, 82 So. 151. A municipal ordinance must be construed with a view towards the purpose for which it was adopted. *City of Birmingham* v. *Mauzey*, 214 Ala. 476, 108 So. 382.

I think it is obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organzied formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions. Thus, the required information is related to the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

Section 1159, supra, provides that the Commission shall issue a permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied is obvious from the purpose of the ordinance. It

would be of little or no value to state that the standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation, it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed.

My conclusions are fully sustained by the decision in *State* v. *Cox,* 91 N. H. 137, 16 A. 2d 508. In that case the court was called upon to determine the constitutionality of a state statute prohibiting a parade or procession on the streets without a permit from local authorities. The statute did not set out a standard for granting or refusing the permit. The court overruled the defendant's contention that the statute vested unfettered control in the licensing authorities. In answering this contention, the court said:

> "The act is implicit in its requirement that the licensing authority act reasonably in granting or denying licenses, and with reference to the object of public order on the public ways. If it does not in express

terms 'make comfort or convenience in the use of streets * * * the standard of official action' (Hague v. Committee for Industrial Organization, 307 U. S. 496, 518, 59 S. Ct. 954, 964, 83 L. Ed. 1423) the necessary inference is that it does, based upon the presumption in favor of the validity of legislation as re-enforced by the express provision of the act bestowing 'delegated powers' upon the authority, as a grant intended to be only of due legislative power which may properly be delegated. The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has, and the legislature attempted to delegate no power it did not possess."

The United States Supreme Court, in a unanimous decision, held that the statute, as construed by the Supreme Court of New Hampshire, violated no federal constitutional rights of the defendants. *Cox* v. *New Hampshire*, supra.

The construction adopted by the Supreme Court of New Hampshire is sound. I would place the same construction upon the ordinance here for review.

There is nothing in the record before us tending to show that the ordinance has been applied in other than a fair and non-discriminatory manner. I cannot agree that this

case, coupled with *Primm* v. *City of Birmingham,* —— Ala. App. ——, 177 So. 2d 236, and the two cases decided on authority of *Primm* constitutes a pattern of enforcement No violation of *Yick Wo* v. *Hopkins,* 118 U. S. 356, has been argued, nor does such violation appear from the record or extrinsically.

So evanescent are the issues in the majority opinion. I most respectfully dissent.

SUPREME COURT, U. S.

FILED

APR 5 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted] 42

FRED L. SHUTTLESWORTH,

Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. ....

FRED L. SHUTTLESWORTH,

Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT IN OPPOSITION TO JURISDICTION OF THE COURT.

Petitioner has not been deprived of right, privileges and immunities Secured by the Constitution of the United States.

STATEMENT IN OPPOSITION TO QUESTIONS PRESENTED.

I. Petitioner has not been denied due process of law by his conviction for violation of Section 1159 of the General City Code of Birmingham of 1944.

II. The application of the Birmingham parade ordinance to Petitioner did not deny him due process of law because said ordinance gave fair notice to Petitioner that he must secure a parade permit

STATEMENT OF CASE.[1]

Petitioner was convicted for violating Section 1159 of the General City Code of 1944 in the Recorders County of Birmingham, Alabama, on May 15, 1963 (R. 1). Petitioner appealed this conviction to Circuit Court for de novo trial on this same date (R. 1). In Circuit Court Petitioner was tried and convicted on a complaint charging that the Defendant (Petitioner) "did take part or participate in a parade or procession on the streets of the City without having secured a permit therefor, from the commission, contrary to and in violation of Section 1159 of the General City Code of Birmingham of 1944" (R. 2, 8, 9, 10).

Petitioner appealed his conviction to the Alabama Court of Appeals, where a split decision was rendered reversing the Circuit Court.[2] Respondent petitioned the Alabama Supreme Court for writ of certiorari, which resulted in a unanimous decision adopting and adding to the dissenting opinion of the Court of Appeals.[3]

This case tests the constitutionality of Section 1159 of the General City Code of Birmingham of 1944, which reads:

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[1] The only record available to Respondent is the one submitted to the Alabama Court of Appeals. Thus, all references to record pages relate to this record.

[2] **Shuttlesworth v. City of Birmingham**, 43 Ala. App. 68, 180 So. 2d 114 (1965).

[3] **Shuttlesworth v. City of Birmingham**, 206 So. 2d 348, decided November 9, 1967.

"Sec. 1159. Parading.

"It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the Commission.

"To secure such permit, written application shall be made to the Commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The Commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

This case does not involve a peaceful, orderly and non-obstructive walk on a city sidewalk. It involves a march beginning with fifty-two people in formation and with hundreds, possibly thousands of pseudo spectators on hand to view the procession.[4] The following summary of the testimony presented in the trial court demonstrates somewhat the character of the parade of April 12, 1963. Evidence of this identical parade can be found in the

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[4] It cannot seriously be contended that this situation did not interfere with the rights of others to use the sidewalks.

record and decision in the case of **Walker v. City of Birmingham,** 388 U.S. 307, 87 S.Ct. 1824, in which case Rev. Shuttlesworth was one of the eight petitioners.

STATEMENT OF RELEVANT FACTS.

On April 12, 1963 about fifty-two persons, including Appellant Fred Shuttlesworth, left a church in the 1400th Block of 6th Avenue North and marched east in formation along 6th Avenue (R. 34, 35, 40, 43, 60, 62, 64). The formation consisted of twenty-six pairs of people about forty inches apart (R. 34, 36, 38, 60, 62). The marchers were singing and clapping their hands (R. 34, 46). The leaders of the group were Martin Luther King, A. B. Abernathy and Fred Shuttlesworth (R. 34, 37, 38). The leaders were dressed in dark shirt and blue jeans (R. 37, 43, 71, 72). The marchers proceeded east along 6th Avenue from the 1400th Block to 17th Street, where they turned south on 17th Street to 5th Avenue North, where they turned east on 5th Avenue. They were stopped in the 1700 Block of 5th Avenue (R. 34, 35, 44).

The Appellant, Fred Shuttlesworth, was not in the formation but walked beside the marchers (R. 36). He marched beside the paraders between the street and the sidewalk (R. 39, 65). Spectators lined the sidewalk on the side next to houses, or south side. The defendant walked on the north side of the marchers (R. 39, 40, 41). The Appellant encouraged the marchers (R. 46) and gave them instructions (R. 60, 61, 64, 65, 66, 67).

A large crowd of possibly over a thousand spectators (R. 44) lined the sidewalk and fell in behind the marchers at 15th Street (R. 44, 20). When Officer Higginbotham saw the marchers at 17th Street and 5th Avenue walking east on 5th Avenue, there were several hundred in the group (R. 20). The Appellant was with the organized group at this time (R. 21, 24). The marchers were stopped

on 5th Avenue between 17th and 18th Street by police officers (R. 24, 26). At the time the marchers were stopped, "there was a lot of loud hollering going on" and some people threw rocks (R. 28). No permit was issued by the City Clerk's office for a parade or procession on April 12, 1963 (R. 30). Petitioner Shuttlesworth testified but made no claim that a permit was ever applied for. That such was the case is also shown by the opinion of this Honorable Court in **Walker v. City of Birmingham**, 388 U.S. 307, 318, 87 S.Ct. 1824, 1830, a directly related case which involved the identical parade or demonstration, and Petitioner here is one of the petitioners in **Walker.**

ARGUMENT.

INTRODUCTORY STATEMENT.

In Reasons for Granting the Writ on Questions Presented, Petitioner rests his case upon alleged lack of due process, assigning two grounds:

I. The Court below mis-applied the United States Supreme Court's decision in **Walker v. City of Birmingham,** 388 U.S. 307, 87 S.Ct. 1824 (June 1967), **Reh. denied,** 88 S.Ct. 12, ... U.S. ... (Oct. 1967), and **Cox v. New Hampshire,** 312 U.S. 569 (1941), so as to bring them in conflict with **Lovell v. Griffin,** 303 U.S. 444 (1938), and **Staub v. Baxley,** 335 U.S. 313 (1958); and,

II. This Honorable Court should grant certiorari to determine if the decision of the Alabama Supreme Court conflicts with **Bouie v. Columbia,** 378 U.S. 347 (1964), because Petitioner was given no fair warning that he was required to get a permit: (A) because of the teaching of prior cases of the United States Supreme Court that he need not submit to a permit ordinance patently unconstitutional on its face; and (B) because he only participated in a peaceful, orderly and non-obstructive walk along the sidewalks of the City of Birmingham.

In Response to the Petition, Respondent denies existence of any sound reason for the granting of certiorari in this case, and denies there is any merit in any of the foregoing questions presented or reasons asserted by Petitioner to sustain a grant of certiorari by this Honorable Court. Respondent's brief follows the same general order in reply to Petitioner's contentions.

I.

There Is No Conflict Between Walker, et al. v. City of Birmingham, 388 U.S. 307, and Cox v. New Hampshire, 312 U.S. 569, as Opposed to Lovell v. Griffin, 303 U.S. 444, and Staub v. Baxley, 355 U.S. 313. The Alabama Supreme Court Did Not Mis-Apply or Wrongly Rely Upon the Walker Case in Its Decision Here. This Court Did Not Overlook Staub-Lovell When Deciding Walker.

A.

Pure Speech Cases Not Here Applicable.

It should be noted at the outset that the Petitioner here was also a petitioner in the **Wyatt Tee Walker case** decided by this Honorable Court on June 12, 1967, and rehearing denied on October 9, 1967 (88 S.Ct. 12). The present case is directly related to the **Walker case** in that both cases dealt with the same ordinance and the same (Good Friday-1963) procession, march, parade or demonstration in which Petitioner participated. Factually, they deal with the same activities and circumstances, although the charges and the trials were different. In **Walker** Petitioner was charged with and convicted of criminal contempt for having participated in the parade or march in violation of an injunction issued by the Alabama Circuit Court, Tenth Judicial Circuit. The punishment for this affront to the dignity of the court was five days in Jefferson County Jail and payment of a fine of $50.00. The present case arose from a conviction in Birmingham Recorders Court on a charge of having violated City Ordinance 1159, the same ordinance violation of which was enjoined in the **Walker case.**

We submit that this Honorable Court was fully aware of **Lovell** and **Staub** and gave due consideration to them when deciding **Walker v. City of Birmingham.** Petitioner

here, as one of petitioners in **Walker**, cited these same cases in their brief in the effort to support the same argument now being made that City Ordinance 1159 was unconstitutional on its face and in conflict with **Lovell v. Griffin** and **Staub v. Baxley**. The United States Solicitor-General also made this contention in an amicus curiae brief.[5] That this argument thus made and repeated was not overlooked by the Court is evident from the citation of one or both of these cases in the dissenting opinions.[6]

B.

Alabama Supreme Court Properly Followed Walker and Cox.

The Alabama Supreme Court properly applied and followed **Walker** and **Cox** in upholding Ordinance 1159 as valid when construed narrowly to achieve safety, comfort and convenience in the use of streets and public ways, including sidewalks. It also properly said, concerning the processing of applications by the City Commission (or other City Governing Body):

> "We also hold that under Sec. 1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inap-

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[5] Mr. Justice Marshall, then United States Solicitor-General, filed a brief in behalf of the United States, as amicus curiae, in which was cited **Staub v. Baxley**; he also contended invalidity on its face of Ordinance 1159. Please see Amicus Curiae Brief filed in **Walker** on behalf of the United States, at pages 13, 14, 17 and 24.

[6] Mr. Chief Justice Warren cited **Staub v. Baxley**, 388 U.S. 329, Note 4, 87 S.Ct. 1836; Mr. Justice Douglas cited both cases to support a tenet of facial unconstitutionality, 388 U.S. 336, 87 S.Ct. 1840; Mr. Justice Brennan likewise cited both cases, 388 U.S. 344, 87 S.Ct. 1840, Note 6.

propriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment with reference to convenience of public use of the streets and sidewalks must be followed." Shuttlesworth v. City of Birmingham—Pet. Br., Appdx, pg. 8(a); 206 So. 2d 348, 352.

The Alabama Supreme Court, in its **Shuttlesworth** opinion, made it clear a permit applied for pursuant to Sec. 1159 could not be denied solely upon the ground that a parade, procession or demonstration might tend to provoke disorderly conduct (Pet. Br., 8(a); 206 So. 2d 348, 351, 352).

That Court also adopted and approved the dissenting opinion of Judge Johnson, Alabama Court of Appeals, when he said:

> "(S)ection 1159 was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest . . ."[7]

And also said:

> "(T)he members of the Commission may not act as censors of what is to be said or displayed in any parade."

Judge Johnson's dissenting opinion strongly rested upon **Cox v. State of New Hampshire,** 312 U.S. 569, affirming **State v. Cox,** 91 N.H. 137, 16 A. 2d 508, together with the fundamental principle that a court in passing upon the validity of a City ordinance "has the duty not to strike it down as unconstitutional if by a reasonable construction it can be given a field of operation within constitutional

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[7] The Supreme Court of Alabama approved and quoted at length from the opinion of Judge Johnson, Pet. Br., Appdx. 4a, 5(a); 206 So. 2d 348, 350, 351, ... Ala. ....

limits". **Shuttlesworth v. City of Birmingham**, 43 Ala. App. 68, 180 So. 2d 114, at page 144 (1965).

The above dissenting opinion of Judge Johnson of the Alabama Court of Appeals, which was adopted by the Alabama Supreme Court, relied upon **Cox v. New Hampshire**; but the Alabama Supreme Court also had the benefit of the statement of Mr. Justice Stewart, speaking for the court in **Walker v. City of Birmingham**, 388 U.S. 307, at 316, 317:

> "The petitioners, however, did not even attempt to apply to the Alabama Courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State of New Hampshire and Poulos v. State of New Hampshire, both supra. Cf. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91, 86 S.Ct. 211, 213, 15 L.Ed. 2d 176; City of Darlington v. Stanley, 239 S.C. 139, 122 S.E. 2d 207. **Here just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face.**" (Emphasis ours.)

The Alabama Supreme Court, just as had Judge Johnson of the Alabama Court of Appeals, gave Sec. 1159 a narrow and precise construction, and as thus properly construed, it is unquestionably constitutional. **Cox v. State of New Hampshire**, 312 U.S. 569, 576; **Cox v. State of Louisiana**, 379 U.S. 536, 558. In fact, we do not find in the petition or supporting brief any contention that Sec. 1159 is invalid as thus construed. Rather Petitioner has chosen to infer that this Honorable Court did not mean what it said in its statement last above quoted: "Here, just as in Cox and Poulos, it could not be assumed this ordinance was void on its face."

As we have heretofore observed, this Honorable Court did not make this statement in an unguarded moment,

overlooking **Staub v. Baxley**, 355 U.S. 313 (1958), and **Lovell v. Griffin**, 303 U.S. 444 (1938). Nor did the Alabama Supreme Court wrongly construe the opinion of this Honorable Court in **Walker**; nor did it wrongly rely upon this Honorable Court's opinion in that case.

We submit that the doctrine of Staub and Lovell has no application to this case, for several reasons. First, we call attention to the fact that these cases involve freedom of speech or freedom of the press in its purest form. But to the contrary, in this case we are dealing with a mass demonstration, parade or procession on the public streets and sidewalks which directly led to mob violence upon the public streets and ways endangering the safety of the demonstrators, or paraders, as well as other citizens of Birmingham. **Walker, et al v. City of Birmingham**, 388 U.S. 307, 310, 311, 89 S.Ct. 1824, 1826, 1827; **Testimony of Officer Higginbotham** (Ala. Ct. App., R. 28).

As City Police Officer R. N. Higginbotham testified:

> "At the time of arrest, there was a lot of hollering going on, there was a lot of rocks being thrown, who threw them I don't know. I don't have any idea who threw the rocks, but I know there was a lot of rock throwing. There was a lot of dodging going on" (Ala. Ct. of Appeals Record, page 28).

Mr. Justice Stewart, speaking for the Court in **Walker, et al. v. City**, 388 U.S. 307, 310, 87 S.Ct. 1824, 1826, after discussing the issuance and service of the writ of injunction upon eight petitioners and the press release issued the next day at Noon, April 10, 1963, by four of the petitioners in that case, including, we interpolate, Rev. F. L. Shuttlesworth, pronouncing their intention to violate the injunction, describes the Good Friday parade, procession or demonstration and the events leading up to it:

> "That night a meeting took place at which one of petitioners announced that 'injunction or no injunc-

tion we are going to march tomorrow'. The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,00 to 1,500 onlookers stood by 'clapping and hollering and (w)hooping'. Some of the crowd followed the marchers and spilled out into the street. At least three of petitioners participated in this march.''—including Rev. F. L. Shuttlesworth, we interpolate (388 U.S. 310, 87 S.Ct. 1826).

Mr. Justice Stewart in the above mentioned opinion in **Walker** also commented upon the fact that the petitioners there had organized and held mass street parades on April 12th and April 14th, 1962, without any previous effort on their part to have the injunction dissolved, modified, or any attempt to secure a parade permit in accordance with its terms.[8]

The Court, in **Walker**, then made clear how different is the status of one who violates a statute or ordinance placing restrictions upon pure speech and one who violates one properly regulating the use of streets or sidewalks:

walks:

''(W)e have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. Cox v. State of New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049; Kovaco v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513; Poulos v. State of New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105;

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[8] The Court's opinion reads: "We are asked to say that the Constitution compelled Alabama to allow petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms" (388 U.S. 310, 87 S.Ct. 1826).

Adderly v. State of Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed. 2d 149. When protest takes the form of mass demonstrations, parades or picketing on public streets or sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. As the Court stated in Cox v. Louisiana, 'We emphatically reject that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by patrolling, marching and picketing on streets and highways as those Amendments afford to those who communicate ideas by pure speech.' 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed. 2d 471."

The United States Supreme Court has also distinguished between statutes or ordinances regulating pure speech and those concerned with parading, marching or picketing in holding that the clear and present danger test, if applicable to cases involving pure speech, certainly could not be applied to parading, picketing or marching or demonstrating before a court house, **Cox v. Louisiana**, 379 U.S. 559, 566, 567, 85 S.Ct. 476, 481.

The conduct of petitioner here enmeshed as it was in a conspiracy to provoke, or at least was a part of a "Movement" intent on provoking, and which did provoke numerous arrests for marching or parading or demonstrating in violation of Section 1159, which marching, parading or demonstrating finally resulted in a taking over of the City streets from sidewalk to sidewalk and in damage to property and injury to one or more persons at the hands of an angry mob gathered by the "Movement". **Walker, et al. v. City of Birmingham**, 388 U.S. 307, 310, 311, 87 S.Ct. 1824, 1826, 1827.

In view of the foregoing, we respectfully submit there is no room for invocation of the doctrine of the **Staub** and

Lovell cases. Whether these cases are dead or not dead is not an issue in this case. Whatever scope of operation they may or may not have is not here relevant. By his own conduct and that of his co-conspirators or associates in the "Movement", they have voluntarily placed themselves beyond the application of their doctrine.

However, we believe those cases never had any relevancy to this case because the ordinance is not unconstitutional on its face and this Honorable Court so held in **Walker, et al. v. City of Birmingham,** when it likened this Section 1159 to those statutes and ordinances involved in **Cox v. State of New Hampshire,** 312 U.S. 569, and **Poulos v. State of New Hampshire,** 345 U.S. 398, 73 S.Ct. 760.

A glance at the **Cox case**[9] shows that Cox was convicted in a criminal proceeding for violating a New Hampshire statute at least as broad if not broader than Sec. 1159. The narrow and precise construction of the statute by the State of New Hampshire Supreme Court was accepted by the United States Supreme Court to sustain the statute

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[9] The statute construed in this case was construed for the first time by the New Hampshire Supreme Court after Cox was convicted for violating it. He ultimately appealed to the United States Supreme Court, where a unanimous Court affirmed his conviction. The New Hampshire statute involved appears in **Cox v. State of New Hampshire,** 312 U.S. 571, 572, 61 S.Ct. 763, 764. Sec. 2 thereof is quoted in the body of the opinion: "No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any grounds abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town or from a licensing committee for cities hereinafter provided for." Secs. 3, 4 and 5 of this Act appear in Footnote 1, 312 U.S. 573, 61 S.Ct. 764. These sections provide for the creation of the Licensing Board, for the written application for the permit specifying the date and hour of the parade or procession, and for the payment of a license fee for each parade or procession up to $300 and a penalty for its violation of a monetary fine not to exceed $500.

and affirm the conviction of Cox. That the Court did not then (1941) overlook the pure speech cases, such as **Staub** and **Lovell**, is attested by the fact that the latter case was cited with favor by the Court which recognized that distributing circulars or carrying signs should be distinguished from conducting a parade or procession in determining the propriety of reasonable regulation by a permit or licensing system on the part of local municipalities in the discharge of their duty to conserve the public convenience in the use of their streets and sidewalks. Please see **Cox v. New Hampshire**, 312 U.S. 574-576, 61 S.Ct. 764, 765, to which we now turn for fuller comparison with this case.

C.

The New Hampshire Cox Cases (A Comparison With This Case).

Petitioner stands convicted of violating Section 1159 of the General City Code of Birmingham of 1944, which is set out in full in Respondent's Statement of Case. Section 1159 proscribes participating in a parade or procession without permit. The same conduct is proscribed by the enactment involved in **Cox.** Each involved a conviction for violation by the respective petitioner of a criminal statute or ordinance construed by the respective Supreme Courts of New Hampshire and Alabama narrowly and precisely after arrest and conviction.

This Court, in the case of **New Hampshire v. Cox**, 312 U.S. 569, 61 S.Ct. 762, affirmed the State court's decision in **State v. Cox**, 16 A. 2d 508, in the only case decided by this Court that we found that is squarely in point with this case. It is readily apparent from reading these two cases that both the conduct of petitioner here and the enactment involved herein are remarkably similar to the conduct and enactment involved in the New Hampshire

case. In both instances, the parade or procession took place on the sidewalk portion of the street. In neither instance was an effort made to secure a permit or license for the parade. In both instances the parade or procession was a prearranged affair. In **State v. Cox** the court determined that the defendants understood that under the statute a permit was required. No serious contention could be made in this case that Petitioner did not understand that a permit was required, and **Walker v. City of Birmingham**, 388 U.S. 307, 315, 87 S.Ct. 1824, 1829 (1967), involving this same parade, leaves no doubt on this score. In view of the discussion next hereinafter set out, lifted from **Cox v. State**, 16 A. 2d 508, there can be no doubt but that Petitioner engaged in a parade or procession.

> "The contention that the defendants were not guilty under the terms of the statute has no merit. As the complaints charged, they 'participated in a certain parade or procession.' A succession of persons substantial in number walked in formal march with signs and placards. This was a parade or procession, such as is required by the statute to be licensed. It was a march in formation, and its advertising and informatory purpose did not make it otherwise. Its single file order did not destroy its character as a procession, nor did its purpose to publish information take it out of the purview of the statute. Each group was an organized unit under leadership and direction. It is immaterial that its tactics were few and simple. It is enough that it proceeded in ordered and close file as a collective body of persons on the city streets. Whether it could be called an assembly, being in motion rather than stationary, is also immaterial. If it might be, it remained a parade or procession as the statute employs the words. Clearly the defendants took part in a parade or procession without a license therefor."

With only slight and completely immaterial modifications, the above language could quite accurately be applied to this case.

On appeal this Court, in **Cox v. New Hampshire**, 312 U.S. 569, 61 S.Ct. 762, agreed with the State court's definition of a parade or procession, saying:

> "There appears to be no ground for challenging the ruling of the state court that appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: 'It was a march in formation, and its advertising and informatory purpose did not make it otherwise . . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in ordered and close file as a collective body of persons on the city streets.' "

Thus, it would appear that the facts and issues of this case are in all material respects identical to those in the **New Hampshire Cox case.** The only differences we note are that in this case there is evidence of a disorder or breach of the peace and the use of pseudo spectators to take over the vehicular portion of the street also (please see Ct. of Appeals, R. 28, and **Wyatt Tee Walker et al. v. City of Birmingham**, 388 U.S. 307, 310, 311, 87 S.Ct. 1824, 1826, 1827), and that Section 1159 does not place a monetary charge on this exercise of free speech as was authorized in the New Hampshire statute.

Cox v. New Hampshire, 312 U.S. 569, also established that parades or processions on the city streets could be regulated by permit or license, even though such conduct fell within liberties secured by the First-Fourteenth Amendments (312 U.S., at page 575):

> "(2-4) Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and discussion of public questions immemorially associated with resort to public places. Lovell v. Griffin, 303 U.S. 444, 451, 5 S.Ct. 666, 668, 82 L.Ed. 949; Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 516, 59 S.Ct. 954, 963, 964, 83 L.Ed. 1423; Schneider v. State of New Jersey, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155; Cantwell v. Connecticut, 310 U.S. 296, 306, 307, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352."

In **Cox v. Louisiana**, 379 U.S., at page 554, we find the same thought expressed:

"The constitutional guarantee of liberty implies the existence of an organized society maintaining public

order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."

As recently as June 12, 1967, this Honorable Court reapproved the rule set out above from the two **Cox cases** in the case of **Wyatt Tee Walker, et al. v. City of Birmingham**, 87 S.Ct. 1824, 388 U.S. 307, **Rehearing denied**, October 9, 1967, 88 S.Ct. 12.

In **Cox v. New Hampshire**, 312 U.S. 576, this Honorable Court discussed the value of a permit requirement as a means to properly police parades and processions:

> "The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that in fixing time and place, the license served to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder."

It thus appears that no absolute right to use the streets for parades or processions exists, even though such parades or processions involve free speech. It also seems clear that a permit or license requirement is a valid as well as appropriate means of regulating parades and processions.

D.

Section 1159 Is Valid on Its Face.

Here we elaborate a point heretofore briefly mentioned. Section 1159 has been set out supra under the heading "Statement of the Case". This enactment was construed in this case by the Alabama Supreme Court, 206 So. 2d 348, and Petitioner's Brief, Appdx, pages 1a-16a. In its construction the Alabama Supreme Court adopted Judge Johnson's construction set out in his dissenting opinion in the case of **Shuttlesworth v. City of Birmingham**, 43 Ala. App. 68, 180 So. 2d 114 (1965), Petitioner's Brief, Appdx, pages 17a-80a:

> " 'I think it is obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organize (sic) formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions. Thus, the required information is related to the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a

bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

" 'Section 1159, supra, provides that the Commission shall issue a permit unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience requires that it be refused. I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied is obvious from the purpose of the ordinance. It would be of little or no value to state that the standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed.' "

The validity of the above construction finds complete support in the case of **State v. Cox**, 91 N.H. 137, 16 Atl.

2d 508, affirmed **Cox v. New Hampshire**, 312 U.S. 569, 61 S.Ct. 762, and in the case of **City of Darlington v. Stanley**, 239 So. C. 139, 122 S.E. 2d 207, which constructions this Honorable Court approved in **Walker v. City of Birmingham**, 388 U.S. 307, 87 S.Ct. 1824, at page 1830:

> "The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State of New Hampshire, and Poulos v. State of New Hampshire, both supra. Cf. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91, 86 S.Ct. 211, 213, 15 L.Ed. 2d 176; City of Darlington v. Stanley, 239 S. C. 139, 122 S.E. 2d 207. Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face."

Here the Alabama Supreme Court has "given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State of New Hampshire and Poulos v. State of New Hampshire, both supra."

This Honorable Court obviously recognized the principle that a statute or ordinance should not be stricken down by a court when it may reasonably be construed to make it valid, and that the State Appellate Courts first have opportunity to construe a state ordinance, which construction is binding upon this Honorable Court when deciding **Walker v. City of Birmingham**, 388 U.S. 307, 87 S.Ct. 1824, application for rehearing denied on October 9, 1967, 88 S.Ct. 12, when this Honorable Court said:

> "The petitioners, however, did not even attempt to apply to the Alabama Courts for an authoritative construction of the ordinance. Had they done so,

> those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State. . . . Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face."

The Supreme Court of Alabama thus properly relied upon **Walker, Cox** and **Poulos** in giving Section 1159 a narrow construction. The effect of this construction is that the ordinance now must be read as if it had been amended to include the construing language of the Alabama Supreme Court opinion. **Winters v. State of New York,** 333 U.S. 507, 514, 68 S.Ct. 665, 669, 92 L.Ed. 840.

Nor can Petitioner properly complain that he had no way to judicially review denial of a parade permit. In the first place, he never applied for such a permit, despite the injunction restraining him and his confederates from participating in such a mass parade without a permit. Secondly, had he made an application and had it been denied, he could have immediately presented a motion to dissolve the injunction on that ground, with expedited review by the Alabama Supreme Court. **Walker, et al. v. City of Birmingham,** 388 U.S. at 318-319, 87 S.Ct. 1830-1831. Moreover, the remedy of mandamus was also available to quickly test any improper denial of a parade permit. **Shirey v. City Board of Education of Fort Payne,** 266 Ala. 185, 94 So. 2d 758; **Poulos v. State of New Hampshire,** 345 U.S. 395, 73 S.Ct. 760. Expedited review by the Supreme Court of Alabama is provided in mandamus cases. See Supreme Court Rule 47, Title 7, Appendix, Code of Alabama 1940, Recompiled 1958.[10]

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[10] Rule 47 reads: "Appeals Involving Extraordinary or Remedial Writs. In all appeals involving extraordinary or remedial writs, these rules shall apply unless the court orders otherwise. In appeals from judgments or decrees rendered in habeas corpus, injunction, certiorari, supersedeas, quo warranto, mandamus, prohibition, and appointing or refusing to appoint a receiver proceeding, the appellant within five days after the appeal has

II.

There Is No Merit in the Petition for Certiorari on the Claim of Conflict With Bouie v. Columbia, 378 U.S. 347 (1964), Because of Petitioner's Contention He Had No Fair Warning He Was Required to Secure a Parade Permit (A) Because of the Alleged Teachings of Prior Decisions of This Court, and (B) Because He Only Participated in a Peaceful, Orderly and Unobstructive Walk Along the Sidewalks of Birmingham.

A.

Petitioner Had Fair Warning That He Would Be Punished When He Violated Section 1159.

We have heretofore discussed at some length the case of **Cox v. State of New Hampshire**, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), decided some twenty-two years before Petitioner and his colleagues and followers openly declared their intention to carry on a "Movement" in the City of Birmingham to blatantly defy and violate a state

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been taken, or the appellee within five days after service of the notice of appeal may petition this court to reduce the time for the filing of briefs in the cause and to specify an earlier date for submission of the appeal. Adversary counsel shall be given three days' notice of the date and time of the proposed presentation of the petition to the court. Upon presentation of the petition, the court may prescribe time limitations for the filing of briefs and for submission which are less than otherwise prescribed by the rules, if the court is of the opinion that the normal time allowed by these rules for filing of briefs and submission of the appeal would work injustice, or the appeal involves a question of great public interest affecting the public good and requires an earlier filing of briefs and submission of the appeal. When the court is not in session, such petition may be presented to and acted upon by the senior accessible member of the court. The provision of this rule providing for the earlier filing of briefs and earlier submission of a cause shall not apply in any case where the appellant, because of uncertainty as to his remedy, seeks relief by mandamus as an alternative to his appeal, nor to appeals in cases where the injunctive relief involved was merely incidental to other relief sought."

court injunction prohibiting the violation of Section 1159 by participating in a mass parade or demonstration, and also openly declared in press release and public meeting their intention to violate it and such other laws as they deemed to be unjust. **Walker v. City of Birmingham,** App. B, 388 U.S. 307, at 323, 324, 87 S.Ct. 1824, at 1833; 1834. The teaching of **Cox v. New Hampshire** is that cities have the right and even the duty to regulate in a reasonable way and conserve for the safety, comfort and convenience of its citizens the use of its streets and sidewalks by requiring those who use them to obtain a permit from the City before conducting thereupon a parade, procession or demonstration. The further teaching of this case is that a broad statute or ordinance properly may be narrowly and precisely construed by the State courts to give such statute or ordinance a field of operation that is consistent with the guarantees of the First and Fourteenth Amendments and that a violator may be punished for his flouting of the law, even though the narrowing language is adopted after his violation. These teachings should have been mastered by Petitioner, who had opportunity to do so for a period of twenty-two years.

Poulos v. State of New Hampshire, 345 U.S. 395, 73 S.Ct. 760 (1953), involved a different application of the same statute dealt with in **Cox.** The latter case concerned parading without a permit, while **Poulos** considered the right to hold an open-air religious service in a park without a permit. In this case Poulos made application for a permit, which was wrongfully denied by the City. Poulos held the services without taking any legal steps to compel issuance of a permit. He was arrested and convicted of violation of the permit requirement of the ordinance. On appeal to the New Hampshire Supreme Court, it affirmed the holding of the Superior Court that the ordinance was valid on its face but the City arbitrarily denied the permit.

This entourage was involved in the violence that resulted (Ala. Ct. App., R. 26).

This technique of the "Movement", using only relatively few paraders accompanied by a mass of "followers" who actually engaged in the violence, was not new. It had been previously used in the Albany, Georgia Movement in 1962, a year earlier. Please see **Kelly v. Page**, 335 F. 2d 114 (U.S. Ct. of Appeals-5th Circuit):

> "The last big demonstration was on July 24, 1962. There were only forty marchers but from 3,000 to 4,000 spectators participated in the ensuing confusion and disorder. . . . There was testimony that Negro spectators on both sides of the street would run out into the street and spit at the officers."

The argument that petitioner's conduct is protected by a claim that he was not fairly warned of its consequences when he participated in the alleged peaceful, orderly and non-obstructive walk along the sidewalks of Birmingham is without merit. The inference that he did not know a permit was required for such a parade, march or demonstration is refuted by his and his colleague's open defiance of the injunction and the ordinance and their obvious awareness that those participating would be arrested for parading without a permit, which they failed or refused to apply for. Please see **Cox v. State of New Hampshire**, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, cited with approval by this Honorable Court in **Walker et al. v. City of Birmingham**, 388 U.S. 307, 87 S.Ct. 1824. In **Cox**, as we have previously noted, the parade was entirely upon the sidewalk and was peaceful. Whereas in this case the formal part of it was upon the sidewalk, but the technique here employed of using an accompanying mob which took over the street and engaged in violence was different and even more deserving of punishment than was the case in **Cox**. That this was a part of a pre-

arranged plan is even more evident by testimony that one of the leaders was seen "organizing members of the crowd in formation" in one of the two parades of April 12th and 14th. **Walker v. City of Birmingham**, 388 U.S. 311, 87 S.Ct. 1827.

Before closing, we advert to an additional reason the petition is without merit. The consequences of Petitioner's failure to apply for a permit leaves him without standing to attack the constitutionality of Section 1159.

Under Respondent's authorities heretofore cited, there is no room to question the facial constitutionality of Section 1159. This point is as well established as the doctrine of stare decisis will permit in the absence of a specific determination in regard to Section 1159. Thus we reach a stage in this argument where the absence of standing of petitioners to question the validity of Section 1159 is raised. The rule in this regard is stated in the case of **Smith v. Cahoon**, 283 U.S. 553, 51 S.Ct. 582:

> ". . . when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration."

The rule cited above should suffice to demonstrate that Petitioner's anticipation of improper action on the part of the City Commission cannot be raised at this time. It should be noted that this same rule was recognized as applicable in the area of free speech in both the **Lovell** and **Staub** cases, supra.

The conviction, however, was allowed to stand because Poulos had not sought the aid of the courts in a mandamus or certiorari proceeding to obtain the permit. The United States Supreme Court affirmed, and in so doing rejected Poulos' argument that the ordinance violated freedom of speech and of religion because: (1) a permit or license to hold a worship service in Goodwin Park could not be required by the City because such requirement would abridge such constitutionally protected freedoms of speech and assembly; and (2) if a permit or license could be required, the arbitrary refusal of the City to issue said permit, coupled with the New Hampshire holding that he must first seek relief from New Hampshire Courts in certiorari or mandamus proceedings before holding the services in the park, would abridge these constitutional rights in that they would delay his right to exercise such rights; and (3) in this situation he was deprived of due process of law. The New Hampshire Supreme Court had rejected these arguments and affirmed his conviction. The United States Supreme Court came to the same conclusion and affirmed his conviction, after considering his constitutional claims, including that of lack of due process. The firm base of this decision was the validity on its face of the ordinance in question on the principle that the narrowing construction of the New Hampshire Supreme Court had effect as though written into the ordinance itself. The argument of Poulos that delay caused by requiring recourse to the state courts deprived him of his constitutional rights, including lack of due process, was pointedly rejected:

> "The valid requirements of license are for the good of applicants and the public. It would be unreal to say that such official failures to act in accordance with state law, redressable state judicial procedures, are state acts violative of the Federal Constitution. Delay is unfortunate but the expense and annoyance of liti-

gation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning. Nor can we say that the state's requirement that redress must be sought through appropriate judicial procedure violates due process." **Poulos v. State of New Hampshire**, 345 U.S. 395, 409, 73 S.Ct. 760, 768, 769.

We recognize **Poulos** came closer to a free speech case than either **Walker** or **Cox** because it had to do with speech in a worship service in a public park. But a number of Supreme Court cases have placed parading, picketing and demonstrating on a public street, sidewalk or way in a much less preferred category than pure speech in regard to the right of municipal governments to regulate them. **Cox v. State of Louisiana**, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed. 2d 471; **Cox v. State of New Hampshire**, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049; **Adderly v. State of Florida**, 385 U.S. 39, 87 S.Ct. 242; **Walker, et al. v. City of Birmingham**, 388 U.S. 307, 315-316, 87 S.Ct. 1824, 1829-1830 (1967).

Harry Kalven, Jr., of the University of Chicago Law School Faculty, in his essay, "The Concept of the Public Forum, 1965 Supreme Court Review", pages 1-32, discusses at length the question of regulation of activities that may conflict with Freedom of Speech and Freedom of Assembly. At page 28 of his essay, Professor Kalven mentions **Lovell v. Griffin** (1937) as the first of the public forum cases, and in which case complete freedom of speech from any sort of prior restraint was discussed. He points out that the Blackstone approach to the problem was that freedom of speech was simply absence of prior restraint. However, Professor Kalven then observes:

> "(T)here is little, if anything, left today to the idea that prior licensing is bad per se, regardless of the criteria used. It now appears that the his-

torical reaction was against general licensing with unlimited or unspecified grounds for exercise of discretion. The recent Times Film case has definitively put to rest any question whether all prior restraints are necessarily bad. **And, in any event, Cox v. New Hampshire stands as a strong and healthy precedent for use of prior restraint, at least in regulating the public forum.**" (Emphasis ours.) Supreme Court Review 1965, pages 28-29.

Petitioner cannot sustain his position asserted in II(A) that this Honorable Court is to blame for his violation of Ordinance, Section 1159, and that he was not given fair warning. This does not square with his and his colleagues avowal of intention to defy and violate the injunction restraining them from violating this ordinance and their open declaration of intention to violate it and all laws they considered unjust. Nor does his claim of unawareness that a permit was required for marching or walking on the sidewalk gain in credibility when contrasted with the closing statement in the press release: "We risk this critical move with an awareness of the possible consequences involved." **Walker v. City of Birmingham**, 388 U.S. 307, at 824, 87 S.Ct. 1824, at 1834.

In speaking of the violation of the injunction by way of violating Section 1159, Mr. Justice Stewart, in **Walker**, dealt with the question of awareness of petitioners of the consequences of their acts: "The injunction in all events clearly prohibited mass parading without a permit, and the evidence shows that petitioners fully understood that prohibition when they violated it." 388 U.S. 317, 87 S.Ct. 1830.

B.

Petitioner's Conduct Was a Violation of Section 1159; Bouie v. Columbia Is Not Involved.

Petitioner has cited **Bouie v. Columbia,** 378 U.S. 347, 87 S.Ct. 1697, which related to a conviction for violation of a trespass statute that was construed by South Carolina to give it a wider scope than was apparent on its face. In a very real sense, no warning was given because the statute was expanded by judicial construction. It has no relevancy here. This case is governed by the rule of **Shuttlesworth v. City of Birmingham,** 382 U.S. 87, 91, 86 S.Ct. 212, 213, where the ordinance was restricted in scope rather than enlarged. Please also see the concurring opinion of Mr. Justice Brennan, 382 U.S. 99, 100, 86 S.Ct. 217, 218. More than that, here the participants were aware of the fact that if they violated the injunction by the marches, walks, parades or demonstrations which they promoted and participated in on April 12, 1963 and April 14, 1963, without a permit, they would have to go to jail. In fact, at meetings held by them they made calls for volunteers to "walk" and go to jail. **Walker v. City of Birmingham,** 388 U.S., at page 311, 87 S.Ct. 1827. On the night before the April 12th demonstration, at one of these meetings, one of the **Walker** petitioners, all leaders in the "Movement", "announced that (i)junction or no injunction we are going to march tomorrow." 388 U.S., at 310, 87 S.Ct., at 1826.

Moreover, the conduct of petitioner on April 12th cannot be isolated from the violent consequences of the demonstration simply because "fifty or sixty people proceeded to parade along the sidewalk" and of the thousand or fifteen hundred gathered around the church from which they started "some of the crowd followed the marchers and spilled out into the street." It was a mass parade. **Walker,** 388 U.S., at 310, 311, 317, 87 S.Ct., at 1827, 1830.

CONCLUSION.

We respectfully urge this case is governed by **Cox, Poulos** and **Walker** and request denial of the petition for writ of certiorari.

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SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 42

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Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1968

No. 42

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Supreme Court of Alabama (A. 163-176) is reported at 206 So. 2d 348 (1967). The opinions of the Court of Appeals of Alabama, Sixth Division (A. 88-154), are reported at 43 Ala. App. 68, 180 So. 2d 114 (1965). The Judgment of the Circuit Court for the Tenth Judicial Circuit of Alabama, convicting petitioner Shuttlesworth and sentencing him to 90 days at hard labor, and to an additional 48 days at hard labor in default of $75 fine and taxable costs of $24 (A. 6-8) is unreported.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered November 9, 1967 (A. 177-178). On January 27, 1968, Mr. Justice Black extended petitioner's time for filing his petition for a writ of certiorari to and including March 8, 1968. The petition was filed March 7, 1968 and granted April 22, 1968. Jurisdiction of this Court rests on 28 U. S. C. §1257(3) (1964), petitioner having asserted below and asserting here the deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Petitioner Shuttlesworth participated, on Good Friday in 1963, in an orderly march of 52 civil rights demonstrators on the sidewalks of the City of Birmingham, Alabama. No permit was obtained for the march under Birmingham General City Code, §1159, pp. 4-5 *infra*, which forbids parades, processions or public demonstrations on the streets or public ways of the city without a permit issued by the City Commission, and which empowers the Commission to deny a permit if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Shuttlesworth was subsequently prosecuted and convicted for violation of §1159. The Court of Appeals of Alabama reversed his conviction, holding *inter alia* that the Good Friday march was not a parade or procession required to be licensed under §1159 and that the ordinance was federally unconstitutional as a regulation for the licensing of First Amendment activity without appropriate narrow standards to govern the licenser's discretion. The Supreme Court of Alabama

reversed, construing §1159—for the first time, four and a half years after the events of 1963—in a fashion which excised the grants of discretion conveyed by such terms as "peace," "decency," "good order," and "morals," and which purported to conform the standards for administration of permits under §1159 to those upheld by this Court in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). It held that petitioner had violated the ordinance so construed, that the ordinance so construed was constitutional, and that petitioner's conviction must be sustained. The questions presented here are:

1. Whether petitioner's conviction is forbidden by the First and Fourteenth Amendments, in that §1159, as it was written and in force in 1963, was facially unconstitutional, with the result that petitioner could not constitutionally be required to comply with its command that he obtain a permit under it for the exercise of his rights of free expression.

2. Whether petitioner's conviction is forbidden by the Fourteenth Amendment's requirement of fair notice of potential criminal liability, where petitioner's disregard of §1159 was squarely within the scope of conduct immunized from criminal prosecution by controlling constitutional decisions of this Court; and where, in addition, the applicability of §1159 to marches on the sidewalks of the City of Birmingham was announced for the first time by the Alabama Supreme Court in his case, four and a half years after the march.

3. Whether, as construed by the Supreme Court of Alabama, §1159 remains unconstitutional by force of the First and Fourteenth Amendments, that it ordains a scheme

of prior licensing of free speech activity, without adequate administrative and judicial procedures to safeguard against the dangers of censorial abuse.

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It also involves the following ordinance of the City of Birmingham, Alabama:

GENERAL CODE OF THE CITY OF BIRMINGHAM, ALABAMA (1944), §1159

> It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
>
> To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare,

peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

Statement

I. The events of Good Friday, 1963, in Birmingham, Alabama.

Between 2:00 and 2:30 p.m. on Good Friday, April 12, 1963, police officers of the City of Birmingham, Alabama, took up surveillance outside a Negro church on the north side of Sixth Avenue North, between Fourteenth and Fifteenth Streets, in Birmingham (A. 18, 28, 36, 45, 53). A meeting was in progress in the church (A. 53). At 2:05 p.m. the petitioner, Reverend Fred L. Shuttlesworth, arrived in a car and entered the church (A. 46). Petitioner was well known to several of the Birmingham officers (A. 46, 57).[1]

In addition to the officers who were "detailed to the downtown area to work and watch for demonstrations that

[1] Petitioner Shuttlesworth is, of course, a " 'notorious' person in the field of civil rights in Birmingham," *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, 102 (1965) (Mr. Justice Fortas, concurring). Toward such a notorious person, "[t]he attitude of the city administration in general and of its Police Commissioner in particular are a matter of public record, . . . and are familiar to this Court from previous litigation. See *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963); *Gober* v. *City of Birmingham*, 373 U. S. 374 (1963); *In re Shuttlesworth*, 369 U. S. 35 (1962)." *Walker* v. *City of Birmingham*, 388 U. S. 307, 325 n. 1 (1967) (Chief Justice Warren, dissenting).

was to take place that afternoon" (A. 45), there assembled in the vicinity of the church a considerable crowd of spectators (A. 44), including a number of photographers (A. 57). At about 2:30 p.m. (A. 46), the late Dr. Martin Luther King, Jr., Reverend Abernathy and petitioner Shuttlesworth led a group of Negro marchers from the church (A. 37, 73-74, 77). The group proceeded east along the north sidewalk of Sixth Avenue North for two and a half blocks to 17th Street, turned south for one block on Seventeenth Street to Fifth Avenue North, turned east again on Fifth Avenue North and proceeded for one-half block before they were confronted and surrounded by police and arrested (A. 37-38, 48, 53). In the middle of the 1700 block of Fifth Avenue, a motorcycle officer drove his motor up to the sidewalk, stationed himself in front of the oncoming marchers, hollered "Does anyone in this group have a permit?" and received no answer (A. 20-21, 25, 51). Other Birmingham police on motorcycles and in cars moved in, sealed the marchers off from the crowd of spectators, arrested the marchers, and loaded them into paddy wagons (A. 27, 51, 60-61). The officers had not asked where the marchers were going before they were arrested (A. 28).

The peaceful conduct of the marchers is not contested. Police and defense witnesses alike agreed that they were orderly (A. 43, 77). The marchers were in formation (A. 20, 23, 37, 47, 53, 54), just walking along (A. 25-26, 30, 43). One police witness said that they were singing, clapping hands and shouting (A. 50). Another said that they were singing when they left the church, but he did not recall whether they continued to sing along the route of march (A. 37, 43). Still another officer heard singing, but reported no clapping or shouting (A. 20, 24, 26). A fourth officer

agreed that there was singing, but could not tell whether it came from the marchers or the spectators (A. 59).

The total number of marchers was 52 (A. 43, 47, 68, 69, 71). They marched only on the sidewalk, except when they crossed streets at intersections (A. 20, 22, 24, 35, 38, 43, 47, 50, 52-53). The police variously testified that the marchers "were marching two abreast . . . approximately forty inches apart" (A. 39; *accord:* R. 41-43, 47, 49 (two officers)), that they were "about three or four wide" (A. 53) "and sometimes more" (A. 57), and that—at the final point where they were confronted and stopped by the police—they were "paired off in fours and sixes" (A. 24; see also A. 22). Defense witnesses testified uniformly that the group proceeded in twos (A. 66, 67, 69, 71, 74, 77), and one police officer who observed the marchers all the way from the church to the point of arrest (A. 40) expressly denied that they ever formed themselves into fours or sixes (A. 42). The officer who described the group as aligned in fours and sixes at the point of arrest also indicated that this formation extended "all the way across the sidewalk" (A. 22), but there was no testimony relating to the proportion of the sidewalk occupied by the marchers at earlier points of the march, and no evidence that at any point they inconvenienced other pedestrians or excluded them from the use of the sidewalk.

As the marchers went along, the crowd of spectators fell in behind them "at a distance" (A. 47).

> "Q. Did they follow them, or did they actually join the group or formation? A. They were following them" (A. 48).

The record is clear that the marchers and the crowd of spectators always constituted distinct groups: the former in an orderly formation of 52, the latter tagging along some distance behind (A. 20, 23-25, 41, 43-44, 57). The spectators—whose numbers were estimated at "several hundred people" (A. 20), or "over a thousand" (A. 48)—were in three locations: some stood on the inside (i.e., the building side) of the sidewalk where the marchers proceeded, at least at the beginning of the march (A. 44); others were on the sidewalk across from the marchers (A. 20, 23, 25); still others were in the middle of the street (A. 25). The police attempted to keep this latter group in the middle of the street (A. 57-58). Nevertheless, there is no evidence that the street was blocked by the crowd of spectators at any point, or that vehicles were obstructed. The one policeman who spoke to the question said he never saw any blocking of the street (A. 22-23).

The spectators were "all black" (A. 23). They were described as "following behind them [the marchers] singing, just loud comments and talking and all that, just generally a disorderly type crowd" (A. 48). Doubtless "disorderly" in this context means "disorganized" (see A. 20, 23), since there was no evidence of disorderly conduct or disorderly acts of any sort on the part of the crowd prior to the time of the arrest of the marchers. Following the arrests, "there was a lot of confusion going on" (A. 27) and "a lot of rock throwing" (*ibid.*), but the officer who testified to this said he did not have "any idea who threw the rocks" (A. 29), and he expressly declined to tie the rock throwing in with the marchers, who were arrested only for parading without a permit (A. 30-31).

It is uncontested that the marchers had no permit. A clerk in the office of the City Clerk testified that no permit for a parade or procession had been issued for Good

Friday, April 12 (A. 31-32). The record is silent as to whether any permit had been applied for. The clerk's book contained records only of permits issued, not of applications made or denied (A. 32). The clerk testified, on the basis of seventeen years experience in the Clerk's Office, that the sort of parades for which permits were customarily issued were held in the streets, not on the sidewalks, and that permits had not been issued for persons picketing, or simply walking on the streets, or for groups assembling and proceeding to board a bus:

"Q. You have seen a number of these parades, haven't you? A. Yes.

"Q. Have you noticed a parade down the streets or on the sidewalk? A. In the streets.

"Q. All in the street? A. Yes.

"Q. And did you notice whether or not these parades would have bands or vehicles in the procession? A. Yes.

"Q. They would? A. Yes.

"Q. And does one get a permit to picket, or just to parade? A. No.

"Q. Does one get a permit to just walk down the street? A. No.

"Q. Do you know whether or not at time when a group of Boy Scouts or Girl Scouts were going to load up on the bus, whether or not they would have to get a permit to get to the bus?

"The Court: That would be a legal question and she wouldn't be competent.

"Mr. Billingsley [counsel for petitioner]: The vital question is whether or not—what she has in the book there.

"A. We have not issued any" (A. 34-35).

Thereupon the trial court foreclosed further inquiry by petitioner's counsel into the nature of the groups, assemblies and processions for which permits had been issued (A. 35).

Petitioner Shuttlesworth's own role in the unpermitted Good Friday march is the subject of some dispute. One arresting officer, who observed the marchers for only about a half block prior to the time when he stopped and arrested them, testified that at the point of the arrest, Shuttlesworth was in the marching group, several rows back from the front (A. 21, 24-25). However, Shuttlesworth, unlike the other marchers, was not arrested at that point (A. 27, 37, 44, 51, 60-61, 68, 70, 71, 74, 78-79).[2] All other officers who testified said that Shuttlesworth was not within the marching formation, that he was not paired off in the line of march, but that he was seen moving from place to place along the curb side of the group, accompanying the group, and talking to them and to the spectators (A. 39-40, 41-43, 44, 48, 49, 50, 58-59). One officer described him as "bounding from the front to the rear and waving his arm to come on, telling them to come on" (A. 50). The other officers could not hear what Shuttlesworth was saying (A. 42, 59), but defense witnesses testified that he was telling the people to be quiet and orderly (A. 67, 69, 71-72, 73-74, 77-78), and Shuttlesworth himself added that he was also asking the crowd of spectators not to join the march formation (A. 77-78). It is not contested that Shuttlesworth was wearing an outfit—blue jeans and a black shirt—that was worn as well by other leaders of the march, Abernathy and Dr. King (A. 40, 46-47, 76, 79-80).

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[2] He was arrested an hour or two later, at a motel (A. 79).

II. The proceedings below.

September 28, 1963, petitioner was criminally charged by complaint in the Circuit Court for the Tenth Judicial Circuit of Alabama, the complaint alleging that he "did take part or participate in a parade or procession on the streets of the City [of Birmingham] without having secured a permit therefor from the commission, contrary to and in violation of Section 1159 of the General City Code of Birmingham of 1944 [set forth at pp. 4-5 *supra*]"[3] (A. 1).

He demurred to the complaint on the grounds, *inter alia*, that section 1159 was an unconstitutional abridgment of his federal First and Fourteenth Amendment rights, that it was facially unconstitutional because it deprived him without due process of the liberty guaranteed by the Fourteenth Amendment, and also because his prosecution under it violated the Equal Protection Clause of the same Amendment (A. 2-3). The demurrer was overruled (A. 6, 16), and he was put to trial before a jury on September 30 and October 1, 1963.

His Motion to Exclude the Testimony and for Judgment, made at the close of the prosecution's case, repeated his First and Fourteenth Amendment contentions, asserting that the conduct proved against him amounted to nothing more than the exercise of rights guaranteed by the Amendments; and it asserted also that there was no evidence to sustain his conviction (A. 4-5). This motion was overruled

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[3] Earlier, on May 15, 1963, petitioner was tried in the Recorder's Court of the City of Birmingham, convicted of violating §1159, and sentenced to 180 days at hard labor and a fine of $100. From this judgment, he took an appeal for trial *de novo* in the Tenth Judicial Circuit Court.

(A. 6-7, 65), renewed at the conclusion of defense testimony (A. 81), and again overruled (*ibid.*).

Petitioner was then convicted and sentenced to 90 days at hard labor, and an additional 48 days at hard labor in default of payment of a fine of $75 and taxable costs of $24 (A. 7-8).

His motion for a new trial, preserving the claims of error in denial of each of his earlier motions (A. 9-10) was overruled October 1, 1963 (A. 8). Petitioner filed his notice of appeal to the Court of Appeals of Alabama on the same day (*ibid.*). His specification of errors in that court again preserved all of his federal contentions (A. 86-87), and was treated by the court as presenting

> "three questions for decision: (1) whether §1159, supra, denies, on its face, due process of law; (2) whether or not the ordinance as applied violates *Yick Wo* v. *Hopkins*, 118 U. S. 356; and (3) the sufficiency of the evidence" (A. 89).

A majority of the Court of Appeals, Sixth Division, speaking through Judge Cates, agreed with petitioner's submissions on each of these three points. Reviewing the record, the court found that the case involved a march of fifty-two persons on the sidewalks of Birmingham (A. 89):

> "The group went along sometimes two, sometimes three, sometimes four, and at one time a witness saw one rank of six abreast. This observed bunching up coincided with the promenaders being blocked by officers parking police cars athwart the crossing at Fifth Avenue and Eighteenth Street.
>
> "There was no evidence that any of the group jaywalked, or that they got into the vehicular roadway

except at designated cross walks. Nor did they obstruct cars or pedestrians, nor disobey any traffic lights, or officers directing traffic. The only tendency toward showing disorderly conduct lay in evidence that some of the group sang and clapped hands" (A. 89-90).

This evidence, the court held, failed "to show a procession which would require, under the terms of §1159, the getting of a permit." Hence there was insufficient evidence to sustain conviction under the ordinance properly construed (A. 139-140). In any event, the ordinance was facially unconstitutional as a prior restraint on First Amendment freedoms, because it was a licensing law which allowed overbroad discretion to the licenser to censor constitutionally protected modes of peaceful expression and petition for redress of grievances[4] (A. 112-134). Finally, the experience of the Court of Appeals with the administration of §1159 by the City of Birmingham was convincing that the "pattern of enforcement exhibits a discrimination within the rule of *Yick Wo* v. *Hopkins*, supra" (A. 134-139). Accordingly, petitioner's conviction was reversed, November 2, 1965 (A. 155). Judge Johnson dissented (A. 144-54).

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[4] "Since the ony stated standards for refusing a permit are those of welfare, peace, safety, health, decency, good order, morals or convenience, we—in addition to overbroadness—find these words, as related to a parade, procession or demonstration, *either sufficiently lacking in preciseness or without a settled applicable common law meaning.*

"For example, in *Hague* v. *Committee* [307 U. S. 496 (1939)], . . . Roberts, J., aptly pointed out that peace on the streets could easily be achieved by suppression.

"In the context of long drawn out resort to congested courts for relief, these stated 'standards'—truly only sources of power, not means to an end—show §1159 to be void on its face" (A. 134, emphasis in original).

Respondent City of Birmingham petitioned the Supreme Court of Alabama for *certiorari* to review the judgment of the Court of Appeals (A. 157-161). The writ was granted January 20, 1966 (A. 162); and on November 9, 1967, the Supreme Court rendered its opinion reversing the Court of Appeals and sustaining petitioner's conviction (A. 163-178). The Supreme Court of Alabama first recited that:

> "In view of the fact that there was a dissenting opinion [in the Court of Appeals], we have gone to the original record to determine the facts. The majority opinion of the Court of Appeals does not contain a complete statement of the facts. However, the dissenting opinion of Judge Johnson contains a rather lengthy recitation of the facts and our examination of the original record shows that the facts as stated in the dissenting opinion are fully supported by the record" (A. 165-166).

However, Judge Johnson's opinion contains no factual findings that depart from those of Judge Cates' opinion for the Court of Appeals (although he did recite some additional, conflicting testimony without attempting to resolve the conflicts). He saw the appeal as involving "approximately 52 persons, most of whom were Negroes, [who] departed from a church . . ., grouped 'in formation' on the sidewalk in front of the church, and then walked 'in formation' along the sidewalks for several blocks" (A. 144). " 'Spectators' lining the route fell in behind and followed the group in formation as they passed by. This crowd of 'spectators'—consisting of several hundred persons—did not walk in formation and had no discernible

organization" (*ibid.*). "The group in formation sang and clapped hands as they proceeded along the sidewalk, but were otherwise orderly" (A. 145). One police officer testified that the group was marching "four to six abreast 'all the way across the sidewalk'" at the point he stopped it and arrested the marchers; that petitioner was in the line of march; and that the crowd of spectators was in the center of the street (*ibid.*). Another testified that the 52 marchers were always only two abreast; and that petitioner was not in the line of march, but walked alongside the marchers, giving them encouragement (*ibid.*). A third officer saw petitioner bounding up and down the line, telling the marchers to come on (*ibid.*). Defense witnesses supported the police versions of the march which reported the marchers paired in twos, with petitioner moving up and down the line talking to the marchers; and they testified that petitioner counseled the marchers to be quiet and orderly, and the spectators not to join the march (A. 146). Without resolving any of the factual controversies raised by this statement of the evidence, Judge Johnson had concluded that the Good Friday march was a parade required to be licensed by §1159 (A. 146-149); that §1159 was required by the First Amendment to be given an exceedingly narrow construction, but that—as so construed—it was facially constitutional (A. 149-153); and that no pattern of discriminatory enforcement appeared to be made out (A. 154).

The Supreme Court of Alabama announced that:

> "The dissenting opinion, unlike the majority opinion of the Court of Appeals, takes cognizance of the rule so often stated by the appellate courts of this state, to the effect that it is the duty of courts not to strike down a city ordinance or a statute as unconstitutional,

> if by reasonable construction it can be given a field of operation within constitutional limits and that where a statute or ordinance is susceptible of two constructions, one of which will defeat the ordinance or statute and the other will uphold it, the latter construction will be adopted" (A. 166).[5]

Employing this mode of approach to Birmingham General City Code §1159, as "susceptible of two constructions," the Supreme Court expressly approved Judge Johnson's restrictive interpretation of the ordinance (A. 168), drastically delimiting the discretion conferred on the Birmingham City Commission by the express terms of §1159, to refuse a permit for parades or processions if "in its judg-

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[5] Judge Cates did not in fact ignore the ordinary doctrines involving the presumption of constitutionality of legislation, but recognized the superior demands of this Court's First Amendment decisions, requiring more than ordinary "[p]recision of regulation" in areas of free expression. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 438 (1963); *Interstate Circuit, Inc.* v. *City of Dallas*, 20 L. ed. 2d 225, 231 (1968).

> "Ordinarily, a court in reviewing legislation will look at the remedy with the favoring intendment that all rationally connected mischiefs passed through the collective mind of the lawmakers. Thus the inhibition of conduct—though sometimes partly innocent—can find support in the state's police power if aimed at a substantial evil.
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> "Nevertheless, this balancing in First Amendment cases finds the scales weighted in the beginning in favor of the freedom which is sought to be restrained. As Rutledge, J., said in *Thomas* v. *Collins*, [323 U. S. 516 (1945)] . . ., at 529-530:
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> > " 'This case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . .' " (A. 110).

ment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused," pp. 4-5 *supra*. The Supreme Court adopted Judge Johnson's tailoring of §1159 on the pattern of the New Hampshire ordinance that survived constitutional scrutiny in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (see A. 168-170), as follows:

> "I think it obvious that this ordinance—Section 1159—was not designed to suppress in any manner freedom of speech or assembly, but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets, and is applicable only to organize [sic] formations of persons, vehicles, etc., using the streets and not to individuals or groups not engaged in a parade or procession. The requirement that the applicant for a permit state the course to be travelled, the probable number of persons, vehicles and animals, and the purpose of the parade is for the purpose of assisting the municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions. Thus, the required information is related to the proper regulation of the use of the streets, and the fact that such information is required indicates that the power given the licensing authority was not to be exercised arbitrarily or for some purpose of its own. The requirement that the applicant state the purpose of the parade or procession does not indicate an intent to permit the Commission to act capriciously or arbitrarily. The purpose may have a bearing on precautions which should be taken by municipal authorities to protect parades or the general public.

"Section 1159, supra, provides that the Commission shall issue a permit 'unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.' I do not construe this as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. The standard to be applied is obvious from the purpose of the ordinance. It would be of little or no value to state that the standard by which the Commission should be guided is safety, comfort and convenience of persons using the streets, and, due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets, it would be practically impossible to formulate in an ordinance a uniform plan or system relating to every conceivable parade or procession. The members of the Commission may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the facts in this case that the Commission would have granted appellant a permit to engage in the parade if such permit had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed" (A. 166-168).

To this construction of §1159, the Supreme Court added the observation that it did not interpret the ordinance as

conferring on the Birmingham City Commission "the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. See *Edwards* v. *South Carolina,* 372 U. S. 229 . . . ." (A. 170). Paraphrasing the language of the *Cox* opinion, *supra,* 312 U. S. at 576, the court said:

> "We also hold that under §1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method or treatment upon the facts of each application, free from improper or inappropriate considerations and for unfair discrimination. A systematic, consistent, and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed" (A. 170-171).

Fitted out with this construction, the ordinance was sustained in reliance upon *Cox* and upon a phrase in *Walker* v. *Birmingham,* 388 U. S. 307, 317 (1967), to the effect that "it could not be assumed that the ordinance [Birmingham General City Code §1159] was void on its face" (A. 171-173). The Alabama Supreme Court acknowledged that "[p]erhaps we have placed too much reliance on *Walker* . . . and on *Cox* . . ." (A. 176), but opined that, "If so, we will no doubt be set straight" (*ibid.*). It summarily rejected the holdings of the Court of Appeals that the Good Friday march was not a "parade or procession or other public demonstration on the streets or public ways" of

Birmingham required to be licensed under §1159 (A. 175-176); and that §1159 had been discriminatorily enforced by the Birmingham authorities (A. 174-175). Petitioner's conviction was therefore sustained (A. 177-178).

An application for certiorari to review the judgment of the Alabama Supreme Court was granted by this Court on April 22, 1968.[6] Trials of approximately 1500 other civil rights demonstrators, arrested during this and other demonstrations occurring over a period of several weeks in the Spring of 1963, in Birmingham and charged, like petitioner Shuttlesworth, only under Birmingham General City Code §1159, are pending the outcome of this case.

Summary of Argument

This prosecution is now more than five years old. It had its origins in a classic, peaceful civil rights demonstration[7] in the City of Birmingham in 1963—a time "when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought."[8] Together with Birmingham's cognate prosecutions of petitioner Shuttlesworth, it stands, in the apt words of Mr. Justice Murphy on another like occasion, "as a monument to man's intolerance of man. Seldom if ever in the history of this nation has there been

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[6] The judgment of the Supreme Court of Alabama was entered on November 9, 1967 (A. 177). Mr. Justice Black extended the time for filing a petition for certiorari until March 8, 1968; and the petition was timely filed on March 7.

[7] As in *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963), "The circumstances in this case reflect an exercise of these basic constitutional rights [of free speech, free assembly, and freedom to petition for redress of grievances] in their most pristine and classic form."

[8] *Walker* v. *City of Birmingham*, 388 U. S. 307, 338-339 (1967) (Mr. Justice Brennan, dissenting).

such a concentrated and relentless crusade to [convict] . . . an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution."[9] See *In re Shuttlesworth*, 369 U. S. 35 (1962); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963); *Gober* v. *City of Birmingham*, 373 U. S. 374 (1963); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964); *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965); *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967).

This most recent *Shuttlesworth* prosecution presents, in essence, one blunt question. Petitioner Shuttlesworth and the other religious leaders of the civil rights movement in Birmingham at the Easter season of 1963 were confronted with a pair of clear legal edicts. The first was Birmingham's parade-permit ordinance, §1159. While the scope of its prohibition was far from certain, one thing about it was plain beyond peradventure. Its grant of discretion to the Birmingham City Commission to refuse a permit when "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused," was as palpably and indisputably unconstitutional as language can make a law. This Court had so held in a dozen controlling decisi ns. The second clear legal edict was the doctrine of this Court, announced repeatedly, unqualifiedly, and in terms precisely applicable to the Birmingham situation, that ordinances like §1159, void for the reasons that §1159 was void, might safely be ignored, and that arrests and prosecutions for their violation were unconstitutional.

Birmingham's civil rights leaders took this Court at its word. They ignored §1159, organized their followers in

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[9] *Bridges* v. *Wixon*, 326 U. S. 135, 157 (Mr. Justice Murphy, concurring).

carefully marshalled, peaceable public demonstrations against racial injustice, and marched during Easter Week. The marchers were arrested in droves, unconstitutionally, if this Court's decisions are the law of the Constitution. They were criminally charged in droves, unconstitutionally as any lawyer, and virtually any literate layman, must have known. Petitioner Shuttlesworth's prosecution proceeded through the Alabama courts as the case to test Birmingham's assertion of a licensing power palpably forbidden by the Constitution. He was convicted in the Recorder's Court, and again in the Circuit Court. Two and a half years after his arrest the Court of Appeals of Alabama, by Judge Cates, read Birmingham General City Code §1159 as it was written, tested it by this Court's First Amendment decisions, and reversed petitioner's conviction. Two additional years later, the Alabama Supreme Court, equally conscious that the ordinance as written and as theretofore understood was void, performed an extreme work of judicial surgery, excised from §1159 express language conferring a discretion to license parades according to the licenser's judgment of public "peace," "decency," "good order," and "morals," wrapped the remainder of the ordinance in the verbal trappings of *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), and so sustained petitioner's conviction of 90 days at hard labor, with an additional 48 days in default of fine and costs.

Thereby, in 1967, the Alabama Supreme Court sought to render retroactively criminal the peaceful civil rights demonstrations that had been, in 1963, constitutionally protected. It sought to render constitutional the arrests of the demonstrators and the repression of their demonstrations that had been, in 1963, constitutionally forbidden. The question now presented is whether any such course of judicial proceedings, converting constitutional rights

ex post facto into criminal liabilities, is itself consistent with the First and Fourteenth Amendments. We think the answer obvious. It is not consistent with the Constitution, for several reasons.

First, this Court has held in an unbroken line of decisions from *Lovell* v. *Griffin,* 303 U. S. 444 (1938), to *Interstate Circuit, Inc.* v. *City of Dallas,* 20 L. ed.2d 225 (1968), that a licensing regulation subjecting the exercise of First Amendment freedoms to the prior restraint of a permit requirement, administered at the discretion of officials in "'the absence of narrowly drawn, reasonable and definite standards for the officials to follow,'" *id.* at 235, is facially unconstitutional and void. The *Lovell* case and subsequent decisions abutting at *Staub* v. *Baxley,* 355 U. S. 313 (1958), hold expressly that persons subject to licensing under such an unconstitutional and void regulation may ignore it, and exercise their rights of free expression without applying for a license. Those decisions control this case. If there remains any meaning to the concept of facial unconstitutionality of an ordinance that broadly and vaguely overshadows free expression with the pall of censorship, Birmingham's §1159 is undisputably bad on its face. Petitioner cannot therefore be punished for refusing to submit to it, however §1159 may be verbally twisted by the Alabama courts four and a half years after the fact.

Second, the rationale of the *Lovell-Staub* line of decisions embodies a principle, vital to the life of the First Amendment, which petitioner's conviction affronts. Increasingly in recent years this Court has refused to permit governmental authority to extend over the range of constitutionally protected speech activity broad "penal statute[s] susceptible of sweeping and improper application." *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 433 (1963).

Increasingly, it has refused to permit governments to force the citizen who seeks to exercise his constitutional rights of free speech to risk prosecution and conviction under such statutes. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). Birmingham's §1159 is a prime instance of the sort of censorial legislation which these decisions condemn. Legislation of the kind abounds, notwithstanding its unconstitutionality, for the obvious reason that its vague strictures permit local authorities to assert a power which, at least until challenged, is effective to repress any and all unpopular or dissentient activity. The course of petitioner's treatment by the Alabama courts demonstrates the final link in the chain by which the repressive force of these statutory schemes is secured. A retroactive retraction of the statute's ostensible scope, worked in the course of a criminal prosecution and employed to validate a conviction, makes challenge to the statute dangerous. Challenge thus discouraged, the broad statutes are left exactly that wide play which this Court has found inimical to federally protected free speech. This result—and petitioner's conviction that subserves it—are clearly unconstitutional.

Third, the due process guarantee of the Fourteenth Amendment protects the petitioner against criminal conviction for conduct undertaken squarely within the protection of controlling decisions of this Court. Petitioner did only what the time-honored *Lovell* and *Staub* decisions, *supra,* had announced he could do with immunity. The constitutional command of fair notice of potential criminal liability must protect, at the least, one who acts squarely within the scope of immunities authoritatively pronounced by the highest court of the Nation. No *ex post facto* shift in the basis of the prosecution can deprive him of this protection. And, in petitioner's case, the vice of lack of

notice was compounded by the vague scope of prohibition of §1159, which the Alabama Supreme Court, reversing the Alabama Court of Appeals, applied to the Good Friday march in violation of the principle that regulations affecting First Amendment conduct must be restrictively construed.

Fourth, for all the verbal efforts of the Alabama Supreme Court to twist Birmingham General City Code §1159 into constitutionally allowable shape, the ordinance remains unconstitutional. This is so because, whatever the standards which the opinion of the Supreme Court has said should govern administration of permits under §1159, neither the section nor generally applicable Alabama procedure provides practical administrative and judicial safeguards to insure the enforcement of those standards in a fashion consistent with the Constitution. In the absence of such "'procedural safeguards designed to obviate the dangers of a censorship system,'" *Teitel Film Corp.* v. *Cusack,* 309 U. S. 139, 141 (1968)—specifically, provisions for regular and recorded administrative processing of application, and for speedy and effective judicial review of their denial—§1159 continues to maintain a regime of unconstitutional prior restraint upon free expression.

The sum of the matter is that the Good Friday march in 1963 was dubiously subject to the strictures of the Birmingham permit ordinance, §1159; §1159 granted such broad discretion to Birmingham city officials that it was inconceivable that any court could give it a construction narrow enough to save its constitutionality; official hostility toward civil rights was a matter of public record throughout the world; there existed the overwhelming probability that Birmingham officials would exercise their unfettered discretion to frustrate petitioner's peaceful pro-

test activities; there was an absence of state judicial procedures to promptly and effectively correct abusive exercises of that discretion or to delimit that discretion; and prior decisions of this Court taught petitioner that he need not submit to an unconstitutional prior restraint upon free expression. Given the concurrence of these circumstances, petitioner's conviction can hardly be squared with due process of law.

ARGUMENT

I.

Petitioner's Conviction Must Be Reversed Because Birmingham General City Code §1159 Was, as Written and in Force in 1963, a Facially Unconstitutional and Void Prior Restraint Upon Free Expression; and Petitioner Cannot Constitutionally Be Punished for Failing to Comply With Its Permit Requirement.

We think there can be no doubt that §1159, prior to the excision of half its operative language and curtailment of the rest by the Supreme Court of Alabama in 1967, was blatantly unconstitutional. Decisions of this Court stretching over a period of thirty years condemned it as a prior restraint upon forms of free expression because it subjected constitutionally protected speech to the requirement of prior licensing without " 'narrowly drawn, reasonable and definite standards for the officials to follow.' " *Interstate Circuit, Inc.* v. *City of Dallas,* 20 L. ed. 2d 225, 235 (1968). See *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939) (Schneider's case); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Jones* v. *Opelika,* 316 U. S. 584, 600-603 (Chief

Justice Stone, dissenting), 611, 615 n. 5 (Mr. Justice Murphy, dissenting) (1942), *vacated and previous dissenting opinions adopted per curiam,* 319 U. S. 103 (1943); *Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Tucker* v. *Texas,* 326 U. S. 517 (1946); *Saia* v. *New York,* 334 U. S. 558 (1948); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Gelling* v. *Texas,* 343 U. S. 960 (1952); *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954); *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954); *Holmby Productions, Inc.* v. *Vaughn,* 350 U. S. 870 (1955); *Staub* v. *Baxley,* 355 U. S. 313 (1958); *Cox* v. *Louisiana,* 379 U. S. 536, 553-558 (1965); cf. *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87 (1965).

These decisions variously exemplify the settled First Amendment doctrine that "an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of these freedoms." *Staub* v. *Baxley, supra,* 355 U. S. at 322. It is obviously difficult to imagine an ordinance more palpably obnoxious to this doctrine than §1159, requiring permits from the City Commission for parades, processions or public demonstrations and authorizing the Commission to deny a permit if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Judge Cates, for the Court of Appeals, aptly characterized this grab-bag of illimitable police powers, tricked out as "standards" for permit denial, when he observed that they were "truly only sources of power, not means to an end"

(A. 134). We take it that the Alabama Supreme Court agreed when, for the express purpose of saving the ordinance and validating petitioner's conviction, it read half of the "standards" ("peace," "decency," "good order," "morals") out of §1159, and construed the remaining half as circumlocutions for traffic control.

But this drastically restrictive reading came on the appeal in petitioner's case, four and a half years after the Good Friday march and his arrest. The Alabama Supreme Court's commendable efforts to save the constitutionality of the Birmingham parade permit ordinance do not and cannot affect that ordinance as it confronted petitioner Shuttlesworth and the other Negro clergymen who were leading the civil rights demonstrations for racial justice in the Easter season of 1963. *That* ordinance was unconstitutional. It was, as the decisions cited in the first paragraph of this subsection, *supra,* quite plainly say, unconstitutional "on its face." And this Court has time and again held that such an ordinance—precisely the sort of licensing ordinance that §1159 is, and constitutionally bad for precisely the same reasons that §1159 is bad—need not be complied with. One who is subject to its facially invalid licensing requirement may ignore it, and engage with constitutional immunity in the exercise of all those rights of free expression for which the ordinance purports to demand a license.

This has been the law of the Constitution since *Lovell* v. *Griffin,* 303 U. S. 444 (1938), *supra.* Because the licensing ordinance there challenged conferred impermissibly broad discretion to permit or refuse First Amendment activity, that ordinance was void on its face; and since it was "void on its face, it was not necessary for [Lovell] . . . to seek a permit under it," *id.* at 452. The *Lovell* doc-

trine was followed in *Schneider* v. *State, supra; Largent* v. *Texas, supra;* and *Jones* v. *Opelika, supra,* all of which decisions reversed the convictions under facially invalid licensing regulations of persons who had refused to apply for the required licenses. *Staub* v. *Baxley,* 355 U. S. 313 (1958), succinctly reaffirmed the principle. The lower courts in *Staub* had held that failure to seek a permit and thus to test the discretion of the licensing authorities precluded a criminal defendant charged with violation of a permit ordinance from assailing the ordinance for overbroad discretion. This Court reversed.

> "This is not an adequate nonfederal ground of decision. The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance. . . . 'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands.' . . ." (*Id.* at 319.)

Accord: Freedman v. *Maryland,* 380 U. S. 51, 56-57 (1965).

It is quite impossible, we submit, to sustain petitioner's conviction without overruling either the long line of decisions collected in the first paragraph of this subsection or the *Lovell-Staub-Freedman* line of cases cited in the preceding paragraph. Petitioner Shuttlesworth and the Easter demonstrators in the City of Birmingham in 1963 took this Court literally at its word. They were confronted with a facially invalid licensing ordinance. As this Court had said they might, they ignored it and marched without applying for or obtaining a license. Petitioner has been convicted for that act, and for that act only. But that act

is constitutionally immune from punishment, so long as *Lovell, Staub* and *Freedman* state the law of the First Amendment. We fail to perceive any logic by which the cases may be distinguished.

In saying this, we do not ignore *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). In *Cox*, demonstrators marched without applying for or getting a license under an ordinance which required a license for parades and failed to prescribe standards for its issuance. On review of the demonstrators' convictions for parading without a license, the New Hampshire courts construed the ordinance as a traffic-control regulation, implying strict and judicially reviewable standards for the licensing function. They sustained the convictions, as did this Court. As the Court saw the case, the *Cox* ordinance was not facially unconstitutional. 312 U. S. at 576-578.

We are quick to concede that the basis for this latter holding is more than a little unclear. It may have been based on the fact that the *Cox* ordinance, unlike Birmingham General City Code §1159, did not affirmatively and explicitly embody impermissible licensing standards, authorizing denial to demonstrators of access to the streets whenever, in the judgment of the City Commission, considerations of "peace," "decency," "good order," "morals," etc. required that a license be refused. (See pp. 4-5 *supra.*) It may be, also, that when Cox marched in the year 1939, the unconstitutionality of a licensing ordinance lacking narrow and specific standards was not as patently and palpably clear as thirty years of decisions by this Court have now made it. Certainly it is the case that, in 1941 when *Cox* was decided, this Court had not had the long experience which it has since had with the dangers of unbridled discretion in the licensing of constitutionally protected

speech activity—an experience which has led it to develop several related constitutional doctrines for the strict confinement of such discretion. See, e.g., *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Ashton* v. *Kentucky*, 384 U. S. 195 (1966); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Interstate Circuit, Inc.* v. *City of Dallas*, 20 L. ed. 2d 225 (1968); and the cases cited in the first paragraph of this subsection.

It may be, finally, that in 1941, this Court was indisposed to recognize for protest marches on the public streets and similar forms of expression the same degree of First Amendment protection against official censorship that it had accorded leafleting in the *Lovell* and *Schneider* cases, *supra*, and nonambulatory public assemblies in the *Hague* case, *supra*. But the doctrines of *Lovell*, *Schneider* and *Hague* have since been applied to all forms of free speech, expression and petition. *Saia* v. *New York*, 334 U. S. 558 (1948) (sound trucks); *Kunz* v. *New York*, 340 U. S. 290 (1951) (street assemblies); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952) (motion pictures); *Cox* v. *Louisiana*, 379 U. S. 536, 553-558 (1965) (street processions and demonstrations). Protest marches are no longer considered, as they once were, dubious candidates for any First Amendment protection. See *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 88 S. Ct. 1601, 1605-10 (1968); *Davis* v. *Francois*, —— F. 2d ——, 5th Cir., No. 25562, decided May 28, 1968. Whatever other restraints may constitutionally be placed upon such marches, by virtue of their physical character, it is now plain that they may not be disallowed or allowed at the arbitrary will of a cen-

sorial permit authority. *Cox* v. *Louisiana, supra;* cf. *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87 (1965).

Whatever may be the basis, however, of the Court's view in *Cox* v. *New Hampshire,* that the ordinance there considered was not facially void, the point remains that that *was* the view the Court took of the case. *Cox* did not purport to overrule the holdings of *Lovell* and *Schneider* that one cannot be punished for failure to submit to a facially unconstitutional licensing ordinance; and it could not, of course, overrule subsequently decided cases to the same effect, such as *Largent, Jones, Staub* and *Freedman.* At most, the upshot of *Cox* is to compel a distinction between ordinances which are *facially* bad and those which are not (although they may be unconstitutionally applied).[10] The bases for such a distinction, in the realm of licensing or permit ordinances, are not indisputably evident in light of *Cox.* Perhaps the bellwether of differentiation is the question whether the ordinance expressly sets forth unconstitutional licensing standards (like §1159), or whether it merely lacks standards (like the *Cox* ordinance). Perhaps it is the question whether the ordinance is unconstitutional with regard to the full range of speech conduct

[10] The archetype of the latter sort of ordinance is the one involved in *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953). Although lacking in explicit standards for the issuance of permits, the *Poulos* ordinance had been judicially supplied with standards of the constitutionally requisite specificity *prior to the time* Poulos applied for a permit, had the application denied, and engaged in unpermitted conduct in violation of the ordinance. For the *Poulos* ordinance was identical to the one considered in *Cox* v. *New Hampshire, supra;* in the *Cox* litigation, concluded before Poulos' application, the New Hampshire courts had narrowly construed the ordinance and set forth standards for its administration, and this Court had sustained it as so construed. Thus, Poulos was on notice both that the ordinance, as a matter of New Hampshire law, contained constitutionally adequate standards, and, as a matter of federal law, that it was constitutional by force of a recent controlling decision of the highest court of the land.

which it seeks to regulate (like §1159), or whether it might constitutionally be applied to some forms of expression.[11] Perhaps it is the question whether the ordinance is plainly, palpably, clearly, undisputably unconstitutional (like §1159). Our submission here may accept any of these or other rationally conceivable distinctions. For it remains evident that, under any of them, §1159 is facially bad.

The only test for facial constitutionality which would not condemn §1159, we suggest, would be the question whether an ordinance is incapable of any *post facto* judicial construction, however implausible or distorting—however it may read plain language out of the ordinance or put unexpectable and inconsistent language in—which may remake the regulation in a constitutional form. And *this*, obviously, cannot be the First Amendment test. For, as the present case demonstrates, there is no ordinance, no assemblage of words or form of language, which cannot be twisted after the fact to mean what it does not say, by a court having the raw power and the will to do so. It need not impugn the conduct of the Alabama Supreme Court—indeed, it may be a credit to that Court—to recognize that

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[11] The test of facial constitutionality is plainly not whether the ordinance might constitutionally be applied to *any* sort of conduct, including conduct outside the realm of protection of the First Amendment. In *Schneider* v. *State, supra,* where the Court allowed a religious colporteur who had not applied for a permit to challenge the applicable permit regulation, for example, the regulation was voided "on its face" as applied to religious solicitors, while the question was expressly reserved whether "commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." 308 U. S. at 165. And in *Largent* v. *Texas, supra,* the Court similarly reversed the conviction of an evangelist who had not applied for a license, in a case where the Court's jurisdiction on appeal from a lower state court depended precisely on the theory that the ordinance was not void in every possible application. See 318 U. S. at 421-422.

its surgical performance on §1159 is simply staggering. It has remade the ordinance out of whole cloth, in attempted deference to the Constitution. But the consequence of this performance for the Easter, 1963 Birmingham civil rights demonstrators, and its lesson for future demonstrators who confront palpably unconstitutional licensing regulations like §1159, is entirely destructive. Such a performance—if it is permitted retroactively to sustain petitioner's conviction—means that the *Lovell-Staub-Freedman* doctrine is rendered nugatory, deprived of all contemporary vitality—except, perhaps, in the case of a state court which neglects to do its constitutional homework before, predictably, affirming a demonstrator's criminal conviction.

We submit that this Court should tolerate no such evasion of *Lovell, Staub* and *Freedman*. Of course, the state courts should not be dissuaded from construing their legislative enactments in a constitutional fashion—or even from torturing them to that end, if necessary. But individuals who exercise their First Amendment rights of free speech, assembly and petition prior to the torturing state judicial construction of an ordinance that is plainly facially invalid as written should and must be protected. No other conclusion would allow the First Amendment that effective range of operation, that "breathing space," which this Court has repeatedly declared it must have. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-487 (1965).

This is so because the application of the *Cox* doctrine below makes *Cox* the instrument for validation and perpetuation of unconstitutional licensing regimes. If the decision of the Alabama Supreme Court stands, every licensing

regulation, however broad the discretionary power it appears to confer upon licensing authorities over the speech activity of the persons required to be licensed, must be obeyed. The resultant damper on constitutionally guaranteed freedoms of expression is obvious. The States are permitted and encouraged to hold out a broad and overhanging threat of greater prior censorship than the First Amendment permits them to exact. So long as the threat is effective and fear of attendant criminal penalties discourages challenge to it, the censorship exerts its full, unconstitutional repressive effect. When and if a challenge is mounted, the state courts (which may or may not be the highest court of a State) announce that the statutory regulation does not mean what it plainly says, and—without removing the overbroad language from the statute books, where it remains to be invoked by the licenser and to cow laymen subject to regulation under it—give it some *post hoc* verbal construction designed and sufficient to bring it barely back across the line of constitutional condemnation. The reward of the citizen for successful constitutional challenge is thus a criminal conviction; challenge is discouraged; and the flourishing of broad reigns of censorship—which appear still to be widespread, notwithstanding this Court's repeated condemnation of them[12]—is approved.

Just this sort of regulation of speech conduct, wherein a State undertakes to threaten by ostensible prohibition a broader range of protected activities than it can con-

[12] The Jackson, Mississippi ordinance recently condemned in *Guyot* v. *Pierce*, 372 F. 2d 658 (5th Cir. 1967), for example, was a portion of the Uniform Traffic Code. See also, e.g., *Baker* v. *Bindner*, 274 F. Supp. 658 (W. D. Ky. 1967); *Gamble* v. *City of Dublin*, 375 F. 2d 1013 (5th Cir. 1967); *King* v. *City of Clarksdale*, 186 So. 2d 228 (Miss. 1966).

stitutionally forbid, has been voided by this Court in numerous contexts other than licensing laws. E.g., *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *N. A. A. C. P.* v. *Button,* 371 U. S. 415 (1963); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967). The teaching of these cases is that such sweeping forms of regulation, asserting State authority to prohibit conduct which the First Amendment protects, are intolerable to the Amendment, whether or not the State can, in the end, make good its threat of prohibition in every case encompassed by the assertion. What is impermissible, what is constitutionally forbidden, is the existence of this sort of dragnet restraint upon precious freedoms of expression.

But the decision below has exactly the effect of vindicating and preserving such a dragnet restraint, by making attack upon it impracticable. For it is clear that what the Alabama Supreme Court has done here is retroactively to validate some 1500 criminal charges, plainly the impermissible incidents of an unconstitutional licensing procedure when made in 1963, by wrapping them about with the verbal habiliments of the *Cox* opinion.[13] Not only does

[13] The Alabama Supreme Court's reliance upon *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967), gives it no additional support. That case spoke to the right of the citizen to flout a judicial injunction, a question not involved here. The Alabama Supreme Court drew upon *Walker* not for any implications that that decision might have for the *Lovell-Staub-Freedman* principle—as to which it has none—but to support the holding that §1159 was constitutional. But it was only in the context of the question whether a judicial decree embodying the ordinance might be ignored that the *Walker* majority said, 388 U. S. at 317, that "it could not be assumed [§1159] . . . was void on its face." And the Chief Justice, in a dissenting opinion in which Justices Brennan and Fortas joined, found §1159 "patently unconstitutional on its face." 388 U. S. at 328.

this have the effect of legalizing the illegal conduct of the Birmingham authorities—and illegalizing the legal conduct of the 1500 Birmingham civil rights demonstrators—in 1963; it leaves Birmingham General City Code §1159 and literally hundreds of cognate statutes and ordinances[14] lying about like so many traps against future free speech activity. Even in the case of §1159 itself, which has now been given an authoritative if belated limiting construction, the danger of irremediable unconstitutional application remains intense, both because of the gap between the limiting construction and what the face of the ordinance appears to countenance, and because of the absence in Alabama of any administrative or judicial machinery serviceable to make the limiting construction more than verbal. (See part III, *infra.*) And, of course, the danger is greater still in the case of other, similar but as yet unconstrued licensing statutes and ordinances, to which the effect of the decision below is to enforce compliance.

The extent of this danger is apparent upon consideration of the alternatives open to the citizen wishing to participate in speech conduct for which such a statute or ordinance requires a license. He may sue the licensing authority to have the regulation declared invalid as an unconstitutional prior restraint. *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota,* 389 U. S. 241 (1967). This is a valuable but luxurious remedy, available only to those with abundance of time, means, and legal services—hardly to be relied upon as a general safeguard of the Constitution. He may refuse to make application for a license, and attempt to challenge the constitutionality of the statute or ordinance when he is prosecuted for its violation. The

[14] See note 12 *supra.*

decision below effectively forecloses this course to all save the foolhardy. Or he may submit to the licenser's discretion, apply for a license, and—if his application is denied—seek some form of judicial review of the denial. This last alternative is the one which the Court in *Lovell, Staub* and *Freedman* expressly held could not constitutionally be imposed upon the citizen, for good reason.

In the first place, a system of enforced compliance with overbroad licensing laws presents no real means of challenging their coercive effect because in practice it preserves wide open, operative and unchallengeable the discretion in the issuer of the licenses. We develop in greater detail, in part III *infra*, the vicissitudes that mine the route of one who seeks, in Alabama, to enforce his constitutional rights by applying for a license and obtaining review of its denial. For present purposes it is enough to note the several circumstances that make virtually insuperable the difficulty of proving a case of judicially revisable arbitrary or discriminatory enforcement of a permit law: the facts that the administrative decision is not required to be made on a record following regularized procedures; that it is not required to be supported by any statement of reasons; and that there is not even required to be kept any administrative log or recording of permit applications and denials. These conditions, together with the prospect of delay involved in any judicial challenge, make the effective and timely reversal of the denial of a permit application in any particular case highly unlikely. And, in any event, no general construction of the overbroad permit law is assured by this route; while facial challenge to it is, of course, denied.

But there is, in the second place, a broader practical justification for this Court's consistent position that a citizen should be free to refuse to submit to a licensing scheme which has a coercive effect upon First Amendment rights. These overbroad laws are numerous and their prior restraints affect large numbers of persons who cannot be supposed to have the knowledge or the resources to combat them by prolonged administrative and judicial challenge. Those who must take to the streets to air their grievances are, more than ordinarily, simple people, deprived people, people whose needs to speak out are urgent and who choose the streets as the forum for their speech precisely because they lack the power, the influence, and the financial means to make their voices effective in administrative or judicial councils. The first effective legal spokesman they are likely to have, capable of speaking the language that moves administrators and courts, is the lawyer appointed for them after they are criminally charged. In the present case alone, 1500 Negro citizens of the City of Birmingham were subjected to the prior restraints of the Birmingham parade ordinance, in several separate incidents, during the Easter season of 1963. If they had sought parade permits under the law, it was and is speculative what construction would have been put upon §1159 by the Birmingham authorities or the Alabama courts—except, of course, that the liberality and fairness announced in 1967 by the Alabama Supreme Court, as canons for the application of §1159, could hardly have been expected.[15] It is

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[15] See UNITED STATES COMMISSION ON CIVIL RIGHTS, 1963 REPORT 112 (1963):

> "The official policy in . . . Birmingham, throughout the period covered by the Commission's study, was one of suppressing street demonstrations. While police action in each

the dissenting opinion of Judge Johnson in the Court of Appeals, to the effect that: "If they [the Commissioners] should act arbitrarily, resort may be had to the courts" (A. 168). This sentence is also the only discussion of procedural matters throughout Judge Johnson's opinion. Judge Cates' majority opinion for the Court of Appeals, voiding §1159, does undertake a detailed study of the ordinance, in comparison with the Model Ordinance Regulating Parades, drafted by NIMLO, the National Institute of Municipal Law Officers. That analysis discloses that §1159 comports no regular administrative procedures, and that its procedures for review of the initial administrative determination are: "None, except to courts, presumably by way of mandamus with alternative prayer for certiorari" (A. 123; see A. 117-123).

Our own understanding of Alabama law is also that mandamus would be the available remedy for review of administrative discretion (however defined) in denial of a permit under an ordinance like §1159. See *Payne* v. *Spragins,* 207 Ala. 264, 92 So. 466 (1922); cf. *Rodgers* v. *Meredith,* 274 Ala. 179, 146 So. 2d 308 (1962). The extraordinary writ proceeding must be first brought in the Circuit Court, *In re Giles,* 133 Ala. 211, 32 So. 167 (1902); from an adverse decision by that court, appeal goes to the Supreme Court of the State. Ala. Code Ann. Tit. 7, §1074 (Recomp. vol. 1960). The statutory provisions governing procedure in mandamus and like proceedings in the Circuit Court are contained in *id.* §§1072-1080. Neither in these provisions nor in any applicable rule of court does there appear any time limit upon judicial consideration of an

equally speculative how long the demonstrators would have been in court—had they been able to take their case to court—before obtaining any construction. One thing, we think, is plain to common sense. There would have been no civil rights marches at Easter time in 1963. There might have been litigation, throughout whose pendency the unlimited breadth of Birmingham General City Code §1159 would have exercised its repressive and unconstitutional restraint. There might have been presentations by the Negro clergymen to the City Commission, and to the courts. But there would not have been on the streets of the city—the forum where, in fact, history shows the advocates of civil rights spoke effectively to the Nation during that Easter season—the freedom of peaceful speech, assembly and petition which the Constitution commands.

In short, it was not heedlessly, we suggest, that this Court in *Lovell,* in *Schneider, Largent* and *Jones,* in *Staub* v. *Baxley,* and in *Freedman* v. *Maryland,* announced the preference of the First Amendment for allowing challenges to the whole regime created by overbroad licensing laws such as §1159. Those decisions recognize that only by facilitating challenges to the laws themselves could their coercive sting be removed. By contrast, the decision below penalizes such challenges. It punishes the citizen who, by daring to assail an overbroad prior restraint, succeeds in having it limited to proper constitutional bounds. This punishment is the dues of that citizen although his challenge

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arrest may not have been improper, the total pattern of official action, as indicated by the public statements of city officials, was to maintain segregation and to suppress protests. The police followed that policy and they were usually supported by local prosecutors and courts."

is the only practicable and effective way to curb the repressive effects of the unconstitutional law. The First Amendment forbids any such punishment. Petitioner's conviction must therefore be reversed.

II.

Petitioner's Conviction Must Be Reversed Because It Imposes Criminal Liability Upon Him Without the Fair Notice Required by Due Process of Law.

A. Our principal submission under the Due Process Clause rests upon the two premises established at the outset of subsection I, *supra*: that, at the time petitioner participated in the Good Friday march in Birmingham in 1963, (i) Birmingham General City Code §1159, as written and in force, was plainly unconstitutional under innumerable, settled, squarely controlling decisions of this Court (pp. 26-27, *supra*), and (ii) equally settled, squarely controlling decisions of this Court established petitioner's right to ignore such an unconstitutional ordinance, and to conduct a peaceful public protest demonstration, not otherwise unlawful, without applying for a permit under §1159 (pp. 28-29, *supra*).

If these two propositions are sound, petitioner acted squarely within the letter and the spirit of a constitutional immunity extended to him by the decisions of the Supreme Court of the United States:

> We fail to see how, under these circumstances, a legal system which has always been supposed to require fair notice of potential criminal liability as a rudimentary demand of due process, see, e.g., *Lanzetta* v. *New Jersey*, 306

U. S. 451 (1939); *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), can countenance petitioner's criminal conviction. If an individual who acts entirely within the unmistakable scope of protection of a constitutional immunity expressly and previously declared by the highest judicial tribunal of the land can retroactively be held criminally accountable for that action, notions of notice are meaningless. The Constitution itself, and the judicial process created to enforce its guarantees, become simply "the most indefensible sort of entrapment." *Raley* v. *Ohio,* 360 U. S. 423, 438 (1959); *Cox* v. *Louisiana,* 379 U. S. 559, 571 (1965). The bitter irony of any such result is highlighted by the recognition which this Court has lately shown for reliance upon the Court's decisions by public authorities who act—as it later is held—unconstitutionally. *Linkletter* v. *Walker,* 381 U. S. 618 (1965); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966). We would suppose that the citizen who claims a constitutional immunity has at least the same entitlement to stand upon this Court's squarely controlling constructions of the Bill of Rights as do public officials who jeopardize those rights. Indeed, the Court has so held in another context. *O'Connor* v. *Ohio,* 385 U. S. 92 (1966).

But we need not reach for analogies, since the point is plain. Criminal punishment for conduct expressly validated by long-settled and oft-repeated decisions of the highest court of the Nation would affront the fundamental conception of *mens rea* that lies at the root of our criminal law. Cf. *James* v. *United States,* 366 U. S. 213 (1961). We submit that, for the same plain reasons, it violates the fair notice requirement of the Due Process Clause.

B. The want of fair notice in this case is compounded by an additional consideration. Although the protective

application of the Constitution to petitioner's conduct at the time he acted was plain enough, the prohibitory application of §1159 was not. Petitioner stands convicted for taking part in an orderly march of 52 persons on the sidewalks of Birmingham. He has uniformly taken the position that this was nothing like the sort of "parade or procession or other public demonstration on the streets or other public ways of the city," for which §1159 requires a permit. The Office of the City Clerk apparently agrees, for the clerk's testimony makes clear that licenses were not issued for groups proceeding on the sidewalks (p. 9, *supra*). The Court of Appeals of Alabama also agreed, holding that the Good Friday march was not "a procession which would require, under the terms of §1159, the getting of a permit" (A. 139). But the Supreme Court of Alabama—which adopted the canon of narrow construction of laws that may infringe upon First Amendment rights, to the extent of narrowing the licensing standards of §1159 in a manner designed to avert impending constitutional invalidation of the ordinance—flouted that same canon in regard to the question of §1159's coverage.

The sum of the matter is that the Good Friday march in 1963 was dubiously within the scope of §1159 and plainly constitutionally protected. It was inconceivable that any court could give the applicable permit ordinance, §1159, a construction narrow enough to save that section constitutionally; and it would have bordered on perversity to suppose that a court so minded to narrow the ordinance would simultaneously expand its scope to reach small sidewalk marches that did not disturb or interrupt pedestrian or vehicular use of the thoroughfares. Nevertheless, both of

these implausible events followed in the wake of petitioner's arrest and prosecution. We submit that their concurrence can hardly be squared with due process of law.

III.

Petitioner's Conviction Must Be Reversed Because §1159, as Construed by the Supreme Court of Alabama, Remains Unconstitutional for Want of Procedural Safeguards Adequate to Assure Against Censorial Abuse of the Licensing Scheme.

The grounds asserted for reversal in parts I and II *supra* turn on the character of §1159 as it was written and in force prior to the restrictive construction of it by the Alabama Supreme Court on the appeal from petitioner's conviction. Neither submission, therefore, requires that this Court decide the question whether §1159, as reformed by the Supreme Court of Alabama, is constitutionally valid. If that question were reached, however, we would submit that the ordinance, even as restrictively interpreted, is unconstitutional by force of the First and Fourteenth Amendments; and that for this additional reason petitioner's conviction must be reversed.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. . . . We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963). Recent decisions by this Court have given practical significance to that paramount First

Amendment principle. *Freedman* v. *Maryland,* 380 U. S. 51 (1965), and *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139 (1968), hold that a scheme of prior licensing of First Amendment activity "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." 380 U. S. at 58; 390 U. S. at 141. The nature of the requisite safeguards is described in the *Freedman* opinion. They may be summarized by the statement that both the administrative and judicial proceedings provided by law must be such as clearly to assure prompt and effective judicial review of a permit denial. See 380 U. S. at 58-60.

Plainly, the licensing scheme of §1159 does not meet these standards.

The ordinance itself, pp. 4-5 *supra,* contains no procedural provisions of any sort (except that both permit applications and permits must be "written"). No regular administrative procedures are shown on this record to be followed by the City Commission in its enforcement of §1159, except that the Office of the City Clerk keeps a book containing carbon copies of issued permits. The clerk testified below that no record of permit applications or denials is kept (A. 32-33). Section 1159 is also entirely silent on the question of judicial review of administrative action.

In its construction of the ordinance, the Alabama Supreme Court is almost equally silent on the question of procedures. The only discussion we are able to find in that court's opinion of the proceedings—administrative *or* judicial—which are envisaged by the licensing scheme of §1159 consists of a single sentence in a quotation from

administrative review proceeding;[16] and Ala. Code Ann., tit. 7, §248 (Recomp. vol. 1960), allowing a defendant 30 days to plead, answer or demur, appears applicable. The scope of review in mandamus is stated in *Lassiter* v. *Werneth,* 275 Ala. 555, 156 So. 2d 647, 648 (1963):

> "To warrant the issuance of mandamus, not only must there be a legal right in the relator, but, owing to the extraordinary and drastic character of mandamus and the caution exercised by courts in awarding it, it is also important that the right sought to be enforced be clear and certain, so as not to admit of any reasonable controversy. The writ does not issue in cases where the right in question is doubtful. . . ."

See also *Shirey* v. *City Board of Education,* 266 Ala. 185, 94 So. 2d 758, 761-762 (1957). This narrow scope of review was applied in a licensing case in *State ex rel. Ducourneau* v. *Langan,* 149 Ala. 647, 43 So. 187 (1907).[17]

We submit that, for several reasons, the licensing scheme approved by the court below, as set forth by the terms of §1159, by the Alabama Supreme Court's opinion construing that section, and by the general Alabama law ap-

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[16] Alabama Supreme Court Rule 47, cited in respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 23-24, n. 10, applies only to proceedings in the Supreme Court of Alabama on review of the judgment of the Circuit Court. It does not restrict the time within which the Circuit Court must rule on the matter, nor shorten the course of ordinary proceedings in the Circuit Court.

[17] We cannot purport to know, of course, whether the ordinary mandamus jurisprudence of Alabama would be applied in §1159 cases. The State appears to have had little experience in judicial review of administrative proceedings by any form of judicial process. But, if some streamlined and new-fashioned sort of judicial review proceedings are envisaged for enforcement of §1159, the Supreme Court of Alabama has failed to say so.

plicable to administration of the ordinance, fails the constitutional requirements of *Freedman* and *Teitel Film* by a wide margin.

In the first place, no regularity of administrative procedure in the processing of license applications is provided for or assured. The administrative decision to grant or deny a permit is not required to be made on a record, or by any standardized form of proceeding conducive to administrative fairness or judicial review. No reasons for the denial of a permit are required to be stated. It is not even required that an administrative recording be made and kept of permit applications and denials. Under these circumstances, the citizen who seeks to challenge the Birmingham City Commission's denial to him of a permit is impossibly handicapped. He cannot, without independent investigation demanding the expenditure of considerable resources, determine and judicially prove that the promise of the Alabama Supreme Court in its construction of §1159—"A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks" (A. 170-171)—is being observed by the Commission. Arbitrary and discriminatory enforcement remains invisible, virtually impossible to prove.

The difficulty is exemplified by this case. Judge Cates, for the majority of the Court of Appeals, took judicial notice of the records of prior §1159 cases in that court and found a pattern of discriminatory application in violation of *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). The Alabama Supreme Court appears to have held that such notice was improper, and the claim of discrimination not factually sustainable. However valid the latter view as a matter of Alabama appellate practice, it highlights the

impracticability of a system of judicial review of administrative decision-making which sits atop an administrative process—like that for enforcement of §1159—which is totally devoid of regular and visible procedures.

Second, no time limits are prescribed within which administrative action on a permit application under §1159 must be had. The ordinance itself makes no reference to time, and does not even require that the application specify a date certain on which the parade, procession or demonstration is to be held—although the *purpose* of the demonstration is required to be stated. It apparently is not envisaged that the Birmingham City Commission is to be held to any particular period—let alone to any particular short period—in its consideration of permit applications.

Third, when judicial review of a permit denial is sought, there is again no fixed, brief period of limitation for either the pleading or the hearing or the decision phases of the review proceeding in the Circuit Court. If the general pleading rules apply, they allow the Commission 30 days to reply to the mandamus petition of the aggrieved license applicant; if those rules do not apply, there is no stated time limitation. Hearing may be set by the Circuit Court, and its decision rendered, at the court's discretion.

Finally, the scope of judicial review of an administrative permit denial is exceedingly narrow. The test is abuse of discretion, and abuse must be clearly shown. Thus, the difficulties which inhere in demonstrating that an administrator has acted wrongly in regard to a decision made without a record, without a statement of reasons, and without even a regular bookkeeping system in which is recorded the history of administrative action in previous like cases, is exacerbated.

In its totality, this licensing scheme is procedurally deficient, and unconstitutional under the First Amendment. While the Alabama Supreme Court has, with considerable effort, supplied verbal standards for the administration of §1159 which appear consistent with the standards articulated by this Court in *Cox*, it has failed to prescribe or require "procedural safeguards," *Teitel Film Corp.* v. *Cusack, supra,* 390 U. S. at 141, adequate to make the constitutionalizing standards more than verbal. For this reason, §1159 is void, and petitioner's conviction under it must be reversed.

CONCLUSION

Petitioner's conviction must be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 42.

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 42.

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT.

STATEMENT.

We do not concede that petitioner's conduct should be dealt with as that of one who was engaging, together with a group of 52 persons, in nothing more than a peaceful, orderly demonstration upon the sidewalks of the City of Birmingham without a permit. It is less than realistic to ignore the surrounding relevant circumstances. These include not only facts developed in the Record in this case, but also those shown in the opinions in the

related case of **Walker v. City of Birmingham** (1967), 388 U. S. 307, 87 S. Ct. 1824.[1]

Some of these revelant circumstances shown by the latter case were that petitioner, together with "many others", was involved in the so-called "Birmingham Movement" in 1963. Several arrests had been made for mass parading without a permit on April 6th and 7th and April 9th and 10th. On the latter date, an injunction was issued to enjoin mass picketing, mass parading, or mass demonstrating without a permit. In defiance of the injunction, a march or demonstration was called for Good Friday, April 12, 1963, with petitioner Shuttlesworth one of its leaders. Some fifty marchers came out of the church at 14th Street and 6th Avenue North, but a large crowd of Negroes were gathered on the outside. **Walker**, 388 U. S., at pages 340, 341. The latter was a crowd of some 1,000 to 1500, "clapping, hollering and whooping", and some of whom followed the marchers and spilled out into the street. This gathering was promoted at a meeting of the "Movement" held the night before at which one of the leaders proclaimed: "Injunction or no injunction, we are going to march tomorrow." **Walker**, 388 U. S., at pages 310, 311.

Earlier the same day, April 11, 1963, in a press release signed by this petitioner and other leaders of the "Movement", they defied the injunction restraining them from violating Section 1159 by holding mass parades without a permit but also openly declared they would not obey laws they considered unjust. **Walker**, 388 U. S. 323, 324. The mass march or procession held April 12, 1963, directly carried out this defiant threat to march, which they did without making any attempt to obtain a permit,

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[1] The Good Friday, 1963 parade or demonstration considered in **Walker** was the identical parade or demonstration for which petitioner was convicted here. 388 U. S. 310, 311, 319; Petitioner's Brief in that case, at page 37. Note: Petitioner Shuttlesworth was also one of the petitioners in **Walker**.

in violation of the ordinance and thus in violation of the injunction. **Walker**, 388 U. S. 315. That it could not be properly described as a mere peaceful, orderly march of 52 civil rights demonstrators upon the sidewalks of Birmingham is obvious.

It was a part of the "Movement" and a part of a planned and controlled takeover of the sidewalks and streets by a mob of some 1,000 to 1,500 in furtherance of the "Movement", in violation of the ordinance and the injunction, ultimately resulting in violence and injury to persons and property. **Walker**, 388 U. S. 310, 311. It is perhaps true that the March of April 12th was slightly less disorderly than the one that followed on April 14, 1963. However, "there was a lot of loud hollering going on and some people threw rocks" in the march of April 12th, and a lot of "dodging going on" (A. 29). Officer Higginbotham, who was stationed at 18th Street and 5th Avenue North, some five blocks from the point of origin of the parade or demonstration, and who testified he stopped it between 17th and 18th Streets on 5th Avenue, stated that the formal part of the parade "were four to six across the sidewalk, all the way across the sidewalk on the North side of 5th Avenue heading east". These were on the north sidewalk of 5th Avenue North, but there was a large crowd approaching from the back of them. They were all over." The group gathering on the opposite side and alongside were not white and black but were all black. On being asked whether he stopped the other group, Higginbotham replied, "Every one stopped at this time that I brought it to a halt" (A. 23). It was a mass moving together and obviously was obstructing the sidewalk and street.

The defiant marches of April 12th and April 14th were conducted by the "Movement", of which petitioner was a highly ranked leader, without making any effort to dis-

solve the injunction restraining them from holding such a mass parade without a permit required by Section 1159. Thus, they deliberately refused to avail themselves of an easily available and expeditious way to quickly test the constitutionality of the ordinance on its face and as applied.

While the Court of Appeals of Alabama, in a 2 to 1 decision, declared Ordinance 1159 unconstitutional, this was reversed by the Alabama Supreme Court in a unanimous decision. It is significant that the Alabama Supreme Court, in its rehearing, had the benefit of this Honorable Court's decision in **Walker**, which was rendered subsequent to that of the Alabama Court of Appeals. **Shuttlesworth v. City of Birmingham**, 281 Ala. 542, 206 So. 2d 348, 352, 353; **Walker v. City of Birmingham**, 388 U. S. 307, 316, 317, 87 S. Ct. 1824, 1830.

Briefly, we here comment on the "Questions Presented". In a nutshell, the question presented here for determination is whether or not in the light of the facts in this case the Supreme Court of Alabama, in deciding this case (206 So. 2d 348, 354), properly relied upon and applied **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210, the established line of cases upholding the right of municipalities to properly regulate the use of its streets and sidewalks for safety and convenience of the public, as distinguished from the co-existent and mutually compatible line of cases relating to censorship of speech or press activities, such as **Lovell** (handing out handbills), **Staub** (soliciting union memberships in private homes), or **Freedman** (previewing movies to approve or disapprove their showing).

In his "Questions Presented", petitioner has taken a somewhat more sophisticated approach. Statements 1 and

2 appear, to overlap if, indeed, 2 is not in essence the same thing as 1. While 3 injects a new issue not presented in his petition for certiorari and seems to be somewhat of an afterthought, we think the questions posed in 1, 2 and 3 are due to be answered in the negative. In our Argument, we shall follow the order used by petitioner, although this will necessitate treatment of some of the same cases in more than one of the three sections of our brief.

SUMMARY OF ARGUMENT.

I.

A. The Supreme Court of Alabama, in the opinion under review, upheld the conviction of petitioner, one of the leaders of the "Movement" in Birmingham which came shortly after and was patterned after the Albany, Georgia "Movement", using the same tactics of takeover of the streets by repeated mass demonstrations where formal marchers were about 40 to 60, but the disorderly psuedo spectators assembled by the "Movement" which actually engaged in the violence numbered in the thousands.

This technique is illustrated by the revealing statement of the United States Court of Appeals, Fifth Circuit, in **Kelly v. Page**, 335 F. 2d 114, concerning the Albany "Movement":

> "The last big demonstration was on July 24, 1962. There were only forty marchers but from 3,000 to 4,000 spectators participated in the ensuing confusion and disorder . . . There was testimony that Negro spectators on both sides of the street would run out into the street and spit at the officers."

Notwithstanding the injunction issues by the State Circuit Court, petitioner and his followers engaged in such disorderly mass parades or processions on April 12th and April 14th, 1963 which became violent mobs in open defiance of the injunction, all Alabama Courts, and all laws they considered unjust.

The conviction of petitioner was for violation of Sec. 1159 of the Birmingham City Code, which is here under attack as being facially unconstitutional as a void prior restraint upon exercise of free speech. This ordinance is set out in the Appendix hereto, at page 73. Its clear and manifest purpose is to conserve safety and conven-

ience in the use of the City streets, including sidewalks, an obligation and duty of the municipality for the benefit of the public as a whole, including petitioner and his followers. **Cox v. New Hampshire** (1941), 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; **Cox v. Louisiana** (1965), 379 U. S. 536, 85 S. Ct. 453; **Walker v. City of Birmingham** (1967), 388 U. S. 307, 87 S. Ct. 1824. This duty is imposed upon "municipal authorities as trustees for the public (who) have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose for which streets are dedicated." **Schneider v. State of New Jersey** (1960), 308 U. S. 147, 60 S. Ct. 146. The City also had a duty to protect the demonstrators in the lawful exercise of their constitutional rights. **Burton v. Wilmington Parking Authority et al.**, 365 U. S. 715, 81 S. Ct. 856, 861, 6 L. Ed. 2d 45; **United States v. U. S. Klans et al.** (1961), 194 Fed. Supp. 897 (D. C., M. D., Ala. N. D.).

In **Lovell-Staub-Freedman**, the line of cases relied upon by petitioner, the matters at issue are quite different. They involve pure speech situations such as distribution of handbills, soliciting members of a union organization in private homes, and censorship of movies. Section 1159 is not facially void as an improper prior restraint. The application for a permit required by it was essential to provide necessary information to enable the City to properly perform its duties to the public and to demonstrators.

B. **Cox v. New Hampshire**, 312 U. S. 569, *supra*, is not in conflict with **Lovell v. Griffin**, 303 U. S. 444. Mr. Chief Justice Hughes, who wrote both opinions, cited **Lovell** in **Cox**. They simply have different areas of application. Certainly **Cox** stands as a strong and healthy precedent for use of prior restraint in regulating the public forum "as it relates to use of streets, including sidewalks." Kalven, "The Concept of the Public Forum," the Supreme Court Review 1965, pages 28-29.

C. We compare **Cox** with the instant case, in the light of **Walker v. City of Birmingham** (1967), 388 U. S. 307, 87 S. Ct. 1824. It is clear the Supreme Court of Alabama properly relied upon these cases holding Section 1159 not facially unconstitutional and in upholding Petitioner's conviction for its violation. Facts in **Cox** and the instant **Shuttlesworth** case are remarkably similar. The formal part of the instant parade was on the sidewalk as in **Cox**. The number of paraders in the present case was about three times the number in each of the separate units in **Cox**. In **Cox** the licensing authority was granted **unlimited** discretion to issue or refuse the permit. In the instant case such discretion was not unlimited but related to public welfare, peace, safety, etc. In both cases the Supreme Courts of New Hampshire and Alabama, respectively, narrowly limited such discretion to a matter of safety and convenience in the use of the streets, including sidewalks. Please see Appendix, pages 73-74.

Walker recognized "the strong interest of state and local governments in regulating the use of their streets and other public places" (388 U. S. 315, 87 S. Ct. 1829), and also suggested the Alabama Courts might give "the licensing authority a narrow and precise scope, as did the New Hampshire Courts in **Cox v. State of New Hampshire** and **Poulos v. New Hampshire**. . . . Here, just as in **Cox** and **Poulos**, it could not be assumed that this ordinance was void on its face" (358 U. S. 316, 317, 87 S. Ct. 1830).

The test of facial constitutionality of an ordinance or state statute by this Honorable Court is its constitutionality after the state court has construed it. **Cox v. New Hampshire**, 312 U. S. 569, *supra*; **Kovacs v. Cooper** (1949), 336 U. S. 77, 85, 69 S. Ct. 448, 452; **Dombrowski v. Pfister**, 380 U. S. 479. Such narrowing construction is properly applied to conduct occurring prior thereto. **Dombrowski**, 380 U. S., at page 491, 85 S. Ct., at 1123.

D. Section 1159 is valid as construed by the Supreme Court of Alabama. The interest of the municipality in the protection of public convenience and peace in the primary uses of streets and parks for the purposes for which they were dedicated should be weighed as against the interest in free expression. **Nieomatko v. State of Maryland** (1951), 340 U. S. 268, 276, 280, 71 S. Ct. 328, 330, 332. Also it is valid as construed because it does not deal with pure speech but with "speech plus"; that is, parading or patrolling or picketing, which may have some elements of communication of ideas but is also much more in that it may well result in confusion, disorder and violence as in this case. **Cox v. Louisiana**, 379 U. S. 554, 85 S. Ct. 464; **Cox v. Louisiana**, Mr. Justice Black dissenting, 379 U. S., at page 584, 85 S. Ct. 671.

Whether the "weighing of interests" or the "speech plus", or both theories are applied, Section 1159 as construed is valid. **Cox v. New Hampshire**, 312 U. S. 569, *supra*; **Walker v. City of Birmingham**, 388 U. S. 307.

The rule is well established by state and federal cases that an ordinance or statute will be narrowly construed, if it can reasonably be done, to save its constitutionality. "Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from possible constitutional infirmity." **Kovacs v. Cooper** (1949), 336 U. S. 85, 69 S. Ct. 452; **Chaplinsky v. State of New Hampshire** (1942), 315 U. S. 568, 62 S. Ct. 766; **Cox v. New Hampshire** (1941), 312 U. S. 569, 61 S. Ct. 762; **Shuttlesworth v. City of Birmingham** (1967), 281 Ala. 542, 206 So. 2d 348.

II.

A. Section 1159 as written provided "fair notice" to petitioner that if he participated in a parade without first obtaining a permit he would be arrested and convicted. The standard for statutory "fair notice" is spelled out in **Lanzetta v. New Jersey**, 306 U. S., at page 453, 59 S. Ct., at page 619:

> ". . . [T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . ."

The first paragraph of Section 1159 proscribes parading without a permit. The second paragraph deals with the administrative procedures for granting or denying the permit. Insofar as "fair notice" is concerned, the only portion of Section 1159 that is material is the first paragraph. The first paragraph reads:

> "Sec. 1159. Parading.
>
> "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the Commission."

The language employed in the first paragraph of Section 1159 is sufficiently explicit to inform petitioner that to participate in a parade without a permit is proscribed. Thus, petitioner had "fair notice" as required by "due process".

B. Petitioner also contends that as written, and under the prior decision of this Honorable Court, Section 1159 was unconstitutional because it vested excessive discretion in the Commission to deny the permit and therefore

he could ignore the plain language of the act and parade without a permit. Thus he contends that since the prior decision of this Court taught him he could ignore Section 1159, he did not have fair notice in spite of the plain language of the act.

It might well be that the state court construction of Section 1159 limiting the discretion vested in the Commission to deny permits was necessary to validate the enactment, but such construction is not only proper but desirable. The case of **Winters v. New York**, 333 U. S. 507, 68 S. Ct. 665, makes it clear that Section 1159 means what the Alabama Supreme Court construed it to mean. In speaking of the effect of a state court's interpretation of an act in the same case, this Honorable Court in **Winters**, at 333 U. S., page 514, 68 S. Ct., page 669, said:

> "The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature."

This rule has been recognized in many cases, including **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824.

C. The prior decisions cited and relied upon by petitioner as holding that he could rely on Section 1159 as written rather than as construed, and therefore ignore the parade permit, fall into four general classifications. These are (a) the movie censorship cases, (b) distribution of literature and solicitation cases, (c) public assembly cases, and (d) the remaining cases.

(a)

The movie censorship cases cited and relied upon by petitioner are **Interstate Circuit, Inc. v. City of Dallas**, 20 L. Ed. 2d 225; **Joseph Burstyn, Inc. v. Wilson**, 343 U. S. 495, 72 S. Ct. 777; **Gelling v. Texas**, 343 U. S. 960, 72 S. Ct. 1000; **Superior Films, Inc. v. Department of Education**, 346 U. S. 587, 74 S. Ct. 286; **Commercial Pictures Corp. v. Regents**, 346 U. S. 587, 74 S. Ct. 286; **Holmby Production, Inc. v. Vaughn**, 350 U. S. 870, 76 S. Ct. 117; and **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734.

The foregoing movie censorship cases all involve enactments creating bodies to censor the content of speech, that is movies, and as such involve pure speech. Section 1159 is an enactment designed to regulate traffic and any regulation of speech incident thereto is strictly speech intermingled with conduct. The fact that strict standards are required of regulations concerned with pure speech is pointed out in both **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Amalgamated Food Emp. U. Local 590 v. Logan Valley Plaza**, 88 S. Ct. 1601 (1968).

Mr. Justice Black and Mr. Justice Douglas would not tolerate censorship under any conditions, **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734; **Interstate Circuit, Inc. v. Dallas**, 20 L. Ed. 2d 225; and on the other hand Mr. Justice Black would not afford any First Amendment protection to persons who parade on the streets. Thus, the distinction between pure speech cases and those involving parading and patrolling and picketing is dramatized.

(b)

The distribution of literature and solicitation cases relied upon by petitioner are as follows: **Lovell v. Griffin**, 303 U. S. 444, 58 S. Ct. 666; **Schneider v. New Jersey**, 308 U. S. 147, 60 S. Ct. 146; **Largent v. Texas**, 318 U. S. 418, 63 S. Ct. 667; **Jones v. Opelika**, 316 U. S. 584, 62 S. Ct. 1231, vacated by 319 U. S. 103, 63 S. Ct. 890; **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277; **Cantwell v. Connecticut**, 310 U. S. 296, 60 S. Ct. 900; **Hague v. C. I. O.**, 307 U. S. 496, 59 S. Ct. 954; **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274.

In 1941 this Honorable Court upheld an enactment virtually the same as Section 1159 in the case of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, and in doing so recognized that the foregoing cases had no application to enactments such as Section 1159. This Honorable Court cited in **Cox** each and every of the foregoing cases that had been decided prior to **Cox**. The distinction made there, and equally applicable here, was that the enactment involved in **Cox** was narrowly construed in the same case, so as not to confer an excessive discretion on the official charged with issuing the permit. The cases not cited in **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, except for **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276, and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274, were all distinguished for this same reason in **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277. These cases were distinguished also in **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453, where this Honorable Court held that because enactments regulating the use of city streets to assure the safety and convenience of the people in their use is an exercise of governmental responsibility to insure order, they involved "speech plus", whereas the cases relied on by petitioner were examples of enactments that

did not regulate city streets to assure the safety and convenience of the people in their use.

The cases of **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276, and **Tucker. v. Texas**, 326 U. S. 517, 66 S. Ct. 274, turned on the authority of a person in charge of a private company owned town and Federal housing project respectively to exclude those whom they did not want from such property to the complete loss of their freedom of speech and religion.

(c)

The public assembly cases relied upon by petitioner are as follows: **Saia v. People of State of New York**, 334 U. S. 558, 68 S. Ct. 1148; **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 313; and **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325.

As heretofore noted under II-C (b), the case of **Staub v. Baxley**, 355 U. S. 313, 78 S. Ct. 277, distinguished **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 313; and **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325, because the enactments involved in those cases vested an unbridled discretion in the official charged with granting or denying a permit to arbitrarily deny the right of public assembly. **Saia v. New York**, 334 U. S. 558, 68 S. Ct. 1148, is distinguished on the same ground. As construed, Section 1159 does not vest an unbridled discretion in the Commission to either grant or deny the permit and consequently this case should be controlled by **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762.

(d)

The remaining cases relied upon by petitioner are **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211.

Cox v. Louisiana, 379 U. S. 536, 85 S. Ct. 453, specifically recognizes the right of a municipality to regulate the use of its streets and recognizes that parades are "speech plus" and therefore can be regulated. **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211, did not involve speech, either "pure" or "plus", and consequently has no relevance. **Shuttlesworth** turned on a question of fair trial.

D. The cases next treated herein were cited by petitioner for analogy and are not in point.

Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731; **Johnson v. New Jersey**, 384 U. S. 719, 86 S. Ct. 1772; and **O'Connor v. Ohio**, 385 U. S. 92, 87 S. Ct. 252, simply held that cases such as **Mapp v. Ohio**, 367 U. S. 643; **Escobedo v. Illinois**, 378 U. S. 478; **Miranda v. Arizona**, 384 U. S. 436; and **Griffin v. California**, 380 U. S. 609, which cases establish new rules of criminal procedure and overturned prior procedures legally relied upon by public officials until these decisions were decided, would not be given retroactive effect.

Raley v. Ohio, 360 U. S. 423, involved facts establishing entrapment and is of no consequence here.

James v. United States, 366 U. S. 213, refused to sustain the conviction of one convicted of attempting to evade federal income taxes, because there was a prior decision rendered by this Court, and relied upon by petitioner, holding that no taxes were due on the particular source of income. This Court changed the law prospectively to make such fund taxable but would not uphold petitioner's conviction.

E. Petitioner had "fair notice" that his march in formation along the city sidewalk was in violation of the proscription in Section 1159. **Cox v. New Hampshire,** 312 U. S. 569, 61 S. Ct. 762, involved a smaller number of people than participated in this parade, and the **Cox** parade also took place on that portion of the street known as the sidewalk. This Honorable Court, in **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, considered this same parade to be parading without a permit and sustained this very petitioner's conviction for contempt for violating an injunction restraining him from participating in any parades without a permit as required by Section 1159.

The General City Code of Birmingham is also clear to the effect that the sidewalk is part of the street, because under Section 2 of said Code we find:

> "Sidewalk. The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

III.

A. The procedural safeguards required of enactments creating censorship systems to review books and movies prior to their dissemination or showing are different from the necessary standards to govern the administrative discretion exercised in the grant or denial of a parade permit. When an enactment creates a system to censor what may be said in advance of it being said, that enactment must provide a prompt administrative proceeding, and if the decision is against the exercise of speech a prompt judicial review to be instituted by the censorship officials. **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734.

The rule in regard to enactments seeking to regulate traffic by requiring a permit to participate in a parade rests on entirely different considerations. Such traffic en-

actments must be narrowly drawn so as to limit the discretion of the official charged with issuing said permit to the extent that he can only deny the permit to assure the safety and convenience of all the people in their use of the streets. **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; and **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453.

Enactments creating censorship systems deal with "pure speech", whereas enactments regulating the use of the streets by requiring parade permits deal with speech intermingled with conduct. **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (1968); and **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453.

B. The normal procedures provided by state law are adequate methods to review an administrative denial of a parade permit. This is the holding of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824. Thus, a mandamus proceeding in Alabama would be sufficient.

Mandamus is afforded an expedited process of review in Alabama. See Alabama Supreme Court Rule 47, Title 7, Appendix, Code of Alabama 1940, Recompiled 1958.

In addition to a mandamus proceeding, petitioner in this particular instance could have obtained an expedited review in equity. At the time of his arrest in this case, petitioner was under an injunction restraining him not to participate in a parade without the permit required by Section 1159. **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824. A motion to "dissolve" or "modify" the injunction offered petitioner another method of expedited review in this case. **Walker v. City of Birmingham**, 388 U. S. 317, 87 S. Ct. 1830, makes this observation and points out that Rule 47, referred to above as afford-

ing an expedited review insofar as an injunction proceeding is concerned, also provides an expedited process of review had Petitioner chosen to file a motion to "dissolve" or "modify" the injunction.

Alabama Circuit Courts, since **Walker v. City of Birmingham**, 388 U. S. 307, also know that the decisions of this Court require an expedited review in such cases, and these courts will comply with the **Walker** decision. If they should fail in this regard, the Alabama Supreme Court, under the authority it has to supervise inferior courts, will see that they do follow the mandate of **Walker.** Alabama Constitution of 1901, Art. 6, Section 140.

ARGUMENT.

I.

Petitioner's Conviction Should Not Be Reversed Because of Facial Unconstitutionality as a Void Prior Restraint Upon Free Expression; and Petitioner Should Be Punished for Failing to Comply With Its Permit Requirement.

A.

Introductory Statement.

Many cases are cited by petitioner in the effort to sustain the affirmative of the above proposition. We have attempted in Part II of our Argument, post pages 35 to 59, to discuss and demonstrate the inapplicability to the instant case of these numerous cases cited by him. Although we shall comment on them again in Part II, we shall here consider primarily the applicability of **Cox v. New Hampshire** (1941), 312 U. S. 569; **Cox v. Louisiana** (1965), 379 U. S. 536, 558; and **Walker v. City of Birmingham** (1967), 388 U. S. 307, a line of cases involving the right of municipalities to reasonably regulate pedestrian and vehicular traffic by requiring a permit for parading and patrolling on its streets, sidewalks and other public ways, as distinguished from the **Lovell-Staub-Freedman** line of cases, which have no application to our case.

B.

Cox vs. New Hampshire
Versus
Lovell vs. Griffin.

Petitioner has bemoaned the demise of **Lovell** if **Cox** is accepted and applied in this case. Requiem for **Lovell** now is inappropriate because it is either premature or a quarter of a century too late. Mr. Chief Justice Hughes delivered the opinion of the Court in both cases. The latter case was decided March 31, 1941, the former March 28, 1938, a difference of exactly three years and three days. **Cox** was a unanimous decision of the Court. **Lovell** was a unanimous decision except that Mr. Justice Cardoza did not sit. The Court, in **Cox**, was composed of Mr. Chief Justice Hughes and Mr. Justice McReynolds, Mr. Justice Stone, Mr. Justice Roberts, Mr. Justice Black, Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Murphy. The Court, in **Lovell**, included Mr. Chief Justice Hughes and five of the above named Justices, i. e., Mr. Justice McReynolds, Mr. Justice Stone, Mr. Justice Roberts, Mr. Justice Black and Mr. Justice Reed.

Since the first case cited in **Cox v. New Hampshire**, 312 U. S. 569, 574, is **Lovell v. Griffin**, 303 U. S. 444, 451, it would be most unusual indeed if there is a violent conflict in the principles enunciated in **Cox** that it would have occurred to at least one of the six members of the Court sitting in both cases if **Cox** indeed killed **Lovell**. The Court which established the principle and application of **Lovell** knew the difference between it and the principle and application of **Cox** (312 U. S., at pages 574, 575, 61 S. Ct. 765):

> "[2-4] Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society

maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinion. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places. Lovell v. Griffin, 303 U. S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949; Hague v. Committee for Industrial Organization, 307 U. S. 496, 515, 516, 59 S. Ct. 954, 963, 964, 83 L. Ed. 1423; Schneider v. State of New Jersey, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155; Cantrell v. Connecticut, 310 U. S. 296, 306, 307, 60 S. Ct. 900, 904, 84 L. Ed. 1213, 128 A. L. R. 1352."

The progeny of **Cox** includes such cases as **Cox v. State of Louisiana**, 379 U. S. 536 and 379 U. S. 559; **Adderly v. State of Florida**, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824. On the other hand, the progeny of **Lovell** includes **Staub v. Baxley**, 355 U. S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302; and perhaps to some extent **Freedman v. State of Maryland**, 380 U. S. 51, 85 S. Ct. 734, although the latter case is concerned with censorship of movies and in no manner related to any sort of use of streets or public ways. The point, however, is that the respective doctrines of the two lines of cases do not conflict but are clearly distinguishable.

In an article by Professor Harry Kalven, Jr., of the University of Chicago Law School,[2] he considers the public forum cases beginning with **Lovell** and on through the two cases of **Cox v. Louisiana**, 379 U. S. 536 and 379 U. S. 559. He notes the emphasis of Mr. Justice Goldberg on "speech plus" as opposed to "pure speech" in describing the activity in a demonstration, parade or march upon public streets, sidewalks and public ways, especially in the vicinity of a court house. **The Supreme Court Review**, 1965, page 22. At page 26 he expresses the idea that "speech plus" and "pure speech", and the "weighing of conflicting interests between municipal control of streets and First Amendment Freedom" theories might well give way to the Meiklejohn Analogy to the employment of Roberts Rules of Order in a town meeting to provide necessary order which inherently requires reasonable restraints to freedom of speech.[3]

Professor Kalven then evaluates **Cox v. New Hampshire** (op. cit. note 2, supra, pages 28-29):

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[2] "The Concept of the Public Forum", the Supreme Court Review 1965, pages 1-32.

[3] Meiklejohn, Political Freedom, 24-28.

"But there is little if anything left today to the idea that prior licensing is bad per se, regardless of the criteria used. It now appears that the historical reaction was against general licensing with unlimited or unspecified grounds for exercise of discretion. The recent Times Film case has definitively put to rest any question whether all prior restraints are necessarily bad. **And, in any event, Cox v. New Hampshire stands as a strong and healthy precedent for use of a prior restraint, at least in regulating the public forum**" (Emphasis added).

Regardless of which of the three tests is applied, **Cox** stands firm as a healthy precedent in cases like the present one.

C.

The New Hampshire Cox Cases (a Comparison With This Case in the Light of Walker).

Petitioner stands convicted of violating Section 1159 of the General City Code of Birmingham of 1944, which is set out in full in the Appendix hereto. Section 1159 proscribes participating in a parade or procession without permit. The same conduct is proscribed by the enactment involved in **Cox**. Each involved a conviction for violation by the respective petitioner of a criminal statute or ordinance construed by the respective Supreme Courts of New Hampshire and Alabama narrowly and precisely after arrest and conviction.

This Court, in the case of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, affirmed the State court's decision in **State v. Cox**, 16 A. 2d 508, in the only case decided by this Court we have found that is squarely in point with our case. It is readily apparent from reading these two cases that both the conduct of petitioner here and the ordinance involved herein are remarkably similar to

the conduct and enactment involved in the New Hampshire case. In both instances, the parade or procession took place on the sidewalk portion of the street. In neither instance was an effort made to secure a permit or license for the parade. In both instances the parade or procession was a prearranged affair. In **State v. Cox,** the court determined that the defendants understood that under the statute a permit was required. No serious contention could be made in this case that petitioner did not understand that a permit was required, and **Walker v. City of Birmingham,** 388 U. S. 307, 315, 87 S. Ct. 1824, 1829 (1967), involving this same parade, leaves no doubt on this score.

The statute for which **Cox** was convicted of violating, as written by the Legislature of New Hampshire,[4] conferred complete and unbridled discretion in the Licensing Board to license or refuse to license parades or processions on the public streets of Manchester, New Hampshire:

"By motions and exceptions, appellants raised the question that the statute was invalid under the Four-

[4] The statute construed in this case was construed for the first time by the New Hampshire Supreme Court after Cox was convicted for violating it. He ultimately appealed to the United States Supreme Court, where a unanimous Court affirmed his conviction. The New Hampshire statute involved appears in **Cox v. State of New Hampshire,** 312 U. S. 571, 572, 61 S. Ct. 763, 764. Sec. 2 thereof is quoted in the body of the opinion: "No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any grounds abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town or from a licensing committee for cities hereinafter provided for." Secs. 3, 4 and 5 of this Act appear in Footnote 1, 312 U. S. 573, 61 S. Ct. 764, supra. These sections provide for the creation of the Licensing Board, for the written application for the permit specifying the date and hour of the parade or procession, and for the payment of a license fee for each parade or procession up to $300 and a penalty for its violation of a monetary fine not to exceed $500.

teenth Amendment of the Constitution of the United States in that it deprived appellants of their rights of freedom of worship, freedom of speech and press, and freedem of assembly, vested unreasonably and unlimited arbitrary and discriminatory powers in the licensing authority, and was vague and indefinite."

Those contentions were overruled by the New Hampshire Supreme Court in **State v. Cox,** 191 New Hampshire ..., 16 A. 2d 508—**Cox** (1941), 312 U. S. 569, 571.

It is crystal clear that the statute as written by the New Hampshire Legislature was constitutionally questionable on its face. But the United States Supreme Court did not consider it as written, but only as the unbridled discretion of the Licensing Board was appropriately narrowed and limited by the Supreme Court of New Hampshire.

Mr. Justice Stewart, speaking for this Honorable Court in **Walker v. City of Birmingham** (1967), 388 U. S. 307, 316, 87 S. Ct. 1830, suggests Section 1159 because of generality of language used would raise substantial constitutional issues. However, he recognized that a State court construction of the ordinance might well give it a narrow and precise application to remove such constitutional problems. It was the failure of the **Walker** petitioners to avail themselves of the opportunity to seek state court construction by a motion to dissolve the injunction which prompted his statement (388 U. S., at pages 316, 317):

"The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State of New Hampshire and Poulos v. State of New Hampshire, both supra. Cf. Shuttlesworth v. City of Bir-

mingham, 382 U. S. 87, 91, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176; City of Darlington v. Stanley, 239 S. C. 139, 122 S. E. 2d 207. Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face."

If we are able to understand the English language, when using the sentence, "Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face", this Honorable Court was saying two things: First, that the question of whether or not a given ordinance or state statute is void upon its face is not determined by this Honorable Court as it was written but as it was construed by the State courts; and, second, that Section 1159 would admit of a narrowing construction to save its constitutionality just as was true of the statute in **Cox.** Please see **Kovacs v. Cooper** (1949), 336 U. S. 77, 85, 69 S. Ct. 448, 452, where conviction for violation of an ordinance prohibiting use on public streets, alleys or thoroughfares of sound trucks was upheld by this Court because it had been narrowly construed by the State Court in the decision appealed from to mean only sound trucks emitting a "loud and raucous" noise in its application to the conduct of the defendant. This case also notes the contrast between statutes or ordinances aimed at censorship of speech and those designed to promote public safety or convenience. Said Mr. Justice Reed (336 U. S. 82, 83, 69 S. Ct. 451, 452):

"When ordinances undertake censorship of speech or religious practices before permitting their exercise, the constitution prevents their enforcement" but "the police power of a state extends beyond health, morals and safety and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of the community"; and at 336 U. S. 88, 69 S. Ct. 454: "To enforce freedom of speech in dis-

regard of the rights of others would be harsh and arbitrary."

Mr. Justice Reed in **Kovacs v. Cooper**, also, perhaps more significantly, observes (336 U. S. 85, 69 S. Ct. 452):

"We accept the determination of New Jersey that Sec. 4 applies only to vehicles with sound amplifiers emitting loud and raucous noises. **Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from possible constitutional infirmity.** Cox v. New Hampshire, 312 U. S. 569, 575, 576, 61 S. Ct. 762, 765, 85 L. Ed. 1049, 133 A. L. R. 1396; Cf. United States v. C. I. O., 335 U. S. 106, 120, 68 S. Ct. 1349, 1356" (Emphasis added).

Before returning to **Walker**, we comment further on the well recognized rule that courts indulge a presumption of validity in considering a statute or ordinance. **Shuttlesworth v. City of Birmingham**, 281 Ala. 542, 206 So. 2d 348, 350; **Goldblatt v. Town of Hempstead** (1961), 369 U. S. 590, 595-596, 82 S. Ct. 987, 8 L. Ed. 2d 130; **Fleming v. Nestor** (1960), 363 U. S. 603, 611, 80 S. Ct. 1367, 4 L. Ed. 2d 1435; **Landry v. Daley** (1968), 280 Fed. Supp. 938, 967 (Three Judge District Court, N. D. of Ill., E. D.); **Sobel v. Adams** (1962), 208 Fed. Supp. 324 (S. D. Fla).

Also, the well established rule is that a narrow interpretation of a statute or ordinance will be adopted where necessary to save it from unconstitutionality. **Shuttlesworth v. City of Birmingham** (1967), 281 Ala. 542, 206 So. 2d 348, 350; **Chaplinsky v. State of New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; **Cf. United States v. Harriss** (1954), 347 U. S. 612, 74 S. Ct. 808, 98 L. Ed. 989, **Landry v. Daley** (1968), 280 Fed. Supp. 938, 967 (Three Judge Court, N. D. Ill., E. D.).

Mr. Justice Harlan, dissenting in **Dombrowski v. Pfister** (1965), 380 U. S. 479, beg. 498, 85 S. Ct. 1116, beg. 1127, disagrees with the majority of five members of this Honorable Court in holding the United States District Court

should enjoin state prosecutions under the Louisiana Subversive Activities and Communist Control Law and its Propaganda Control Law pending non-criminal proceedings for state declaratory judgments narrowly construing such laws, and further holding and declaring two sections of one of said acts [364 (4) and 364 (7)] facially void and unenforceable, apparently because they were deemed not to admit of any saving construction by any court.[5] Mr. Justice Harlan pointed out that state and federal courts alike have a duty to give a narrowing construction to an ordinance or statute in the effort to save as much of it as possible. He cites: **Fox v. State of Washington**, 236 U. S. 273, 35 S. Ct. 383; and **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760, 99 L. Ed. 1165.

Mr. Justice Brennan, speaking for the majority in **Dombrowski v. Pfister**, 380 U. S. 479, *supra*, recognized that ordinarily a state court construction of a state statute should be obtained before it is considered by this Court. A criminal proceeding would be preferred in ordinary circumstances to accomplish such result. However, the federal injunction and the state declaratory judgment method of obtaining properly narrowing construction in the state courts was considered necessary because the charge that enforcement of such statutes for purposes of harassment without expectation of ultimate successful prosecution was an issue and because many different criminal prosecutions would be required to illuminate "the contours of an otherwise vague prohibition". Mr. Justice Brennan, in 380 U. S., at page 491, 85 S. Ct. 1123, then in the text and Note 7, elaborated on the non-applicability of the doctrine of abstention as follows:

> "As we observed in Baggett v. Bullitt, supra, 377 U. S. at 378, 84 S. Ct., at 1326, this cannot be satisfactorily done through a series of criminal prosecutions,

[5] A statute substantially identical to 364 (4) had been previously invalidated by this Court, 380 U. S. 494.

dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecution, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others. Here, no readily apparent construction suggests itself as a vehicle for **rehabilitating the statutes** in a single prosecution, and appellants are entitled to an injunction. The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions.[7]

"On this view of the 'vagueness' doctrine, it is readily apparent that abstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the **conduct charged** in the indictments **is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of 'hardcore' conduct that would obviously be prohibited under any construction.**" (Emphasis added.)

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[7] Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, see Poulos v. State of New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105; Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, provided such application affords fair warning to the defendants, see Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888; cf. Harrison v. NAACP, 360 U. S. 167, 179, 79 S. Ct. 1025, 1031, 3 L. Ed. 2d 1152.'

Possibly a more direct statement of Mr. Justice Brennan in **Dombrowski** of the point we are making—that unless the statute or ordinance is on its face so invalid that no reasonable construction could save it from unconstitutionality a state statute or ordinance is by this Honorable Court deemed facially unconstitutional only after the state courts have had opportunity to give such narrowing construction—appears at page 497 of 380 U. S. (1126 of 85 S. Ct.):

> "The precise terms and scope of the injunctive relief to which appellants are entitled and the identity of the appellees to be enjoined cannot, of course, be determined until after the District Court conducts the hearing on remand. The record suffices, however, to permit this Court to hold that, **without the benefit of limiting construction, the statutory provisions on which the indictments are founded are void on their face**; until an acceptable limiting construction is obtained, the provisions cannot be applied to the activities of SCEF, whatever they may be" (Emphasis added).

We now return to **Walker**. In the light of the language used by Mr. Justice Stewart, speaking for the majority, it is clear the doctrine of **Cox** and **Poulos** apply to this case rather than that of **Lovell-Staub-Freedman**. In parade permit cases which concern safety and convenience in the use of the streets, sidewalks and public ways, the "hard-core" conduct to which Mr. Justice Brennan refers in **Dombrowski v. Pfister**, 380 U. S., at pages 491-492, and in his concurring opinion in **Shuttlesworth v. City of Birmingham** (1965), 382 U. S. 87, 99, 86 S. Ct. 211, is the act of participating in a parade or procession without making application for and securing the permit required by Section 1159. Any overbreadth of discretion in the City Commission in its issuance was removed by the Supreme Court of Alabama. The only issue now before this

Honorable Court in harmony with the reasoning of **Dombrowski, Kovacs, Poulos** and **Cox** is whether the Alabama Supreme Court has so construed 1159 that such discretion must be exercised within sufficiently narrow limits that the ordinance shall operate not as a device for censorship or to control or limit what is said but shall limit its operation in a non-discriminatory way to enable the City to perform its duty of preserving safety and convenience of the public in the use of its streets, including sidewalks and public ways, consistent with the use for which they were intended. It is immaterial that the ordinance may have been questionable on its face prior to such construction, and it is immaterial that this construction was given after the arrest of petitioners.

If this ordinance was foredoomed to complete destruction because it was void and unconstitutional on its face to the extent no reasonable state court construction could possibly save it, then the words of this Honorable Court quoted and relied upon by the Supreme Court of Alabama in its opinion and decision in this case would, we submit, be most strange if not entirely inexplicable.[6]

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[6] We quote from **Shuttlesworth v. City of Birmingham,** 206 So. 2d 348, at page 353, in which the Alabama Supreme Court in relying upon **Walker** uses this language: 'The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the ordinance. Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire Courts in Cox v. State of New Hampshire (312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049) and Poulos v. State of New Hampshire (345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105), both supra. Cf. Shuttlesworth v. City of Birmingham, 382 U. S. 87, 91, 86 S. Ct. 211, 213, 15 L. Ed. 2d 176; City of Darlington v. Stanley, 239 S. C. 139, 122 S. E. 2d 207. **Here, just as in Cox and Poulos, it could not be assumed that this ordinance was void on its face** (Emphasis supplied) (87 S. Ct. 1830)"; and: "The petitioners in the case of Walker, et al. v. City of Birmingham, 388 U. S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210, decided by the Supreme Court of the United States on June 12, 1967, asserted that they were free to disobey the injunction because Section 1159, on which the injunction was

D.

Section 1159 Is Valid as Construed, Under the "Weighing of Interests" as Well as the "Speech Plus" Doctrine. Both Recognize the Right of Municipalities to Exercise Reasonable Control Over Its Streets, Including Sidewalks, for Safety and Convenience in Their Use as Set Forth in Cox v. New Hampshire.

In a concurring opinion in **Niemotko v. State of Maryland** (1951), 340 U. S. 268, 276, 280, 71 S. Ct. 328, 330, 332, Mr. Justice Frankfurter states the problems: "(H)ow to reconcile the interest in allowing free expression of ideas in public places with protection of the public peace and of the primary uses of streets and parks . . ." In the course of the opinion, many cases are compared or distinguished. He discusses **Lovell v. Griffin**, 303 U. S. 444, 58 S. Ct. 666, and without noticing any conflict with its holding comments on **Cox v. New Hampshire**, 312 U. S. 569, supra, saying:

> "Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, made it clear that the United States Constitution does not deny localities the power to devise a licensing system if the exercise of discretion by the licensing officials is appropriately confined. A statute requiring a permit and license fee for parades had been narrowly construed by the

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based, had been administered in an arbitrary and discriminatory fashion. In support of that contention those petitioners had sought to introduce evidence in the trial court to the effect that a few days before the injunction issued requests for permits to picket had been made to a member of the City Commission and one request had been rudely refused and that this same official had later made it clear that he was without power to grant the permit alone, since the issuance of permits was the responsibility of the entire Commission. The Supreme Court of the United States, in answering that contention, said as follows: 'Assuming the truth of the proffered evidence, it does not follow that the parade ordinance is void on its face.'"

State courts. The license could be refused only for 'considerations of time, place and manner so as to conserve the public convenience', and the license fee was 'to meet the expense incident to the administration of the act and the maintenance of public order in the matter licensed'. 312 U. S. at pages 575-576, 577, 61 S. Ct., at pages 765, 766, 85 L. Ed. 1049. The licensing system was sustained even though the tax, ranging from a nominal amount to $300, was determined by the licensing officials on the facts of each case." **Niemotko v. State of Maryland**, 340 U. S. 280, 71 S. Ct. 332.

The case of **Cox v. State of Louisiana**, 379 U. S. 536, 555, 85 S. Ct. 453, 464, illustrates the principle that marching, picketing or patrolling is more than pure speech: "We emphatically reject the notion urged by Appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

At a later point in his opinion Mr. Justice Goldberg clearly demonstrates that **Cox v. New Hampshire**, 312 U. S. 569, *supra*, squares with the above statement of principle (379 U. S. 558, 85 S. Ct. 466):

> "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" * * * [and with] a "systematic, consistent and just order of

treatment, with reference to the convenience of public use of the highways * * *"'.' Cox v. State of New Hampshire, supra, 312 U. S., at 576, 61 S. Ct., at 766; see Poulos v. State of New Hampshire, supra."

At the very heart of the solution of the problem of safe and orderly use of the streets, including sidewalks, for parades and processions is the requirement of a permit to be issued after proper application:

"The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the Court further observed that in fixing time and place, the license served to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder."

Cox v. New Hampshire, 312 U. S. 576.

In this case, open defiance of Section 1159 and all other laws petitioners and the "Movement" considered unjust, pursuant to which they mounted the April 12, 1963 march accompanied by a thousand or more pseudo-spectators filling the sidewalks and spilling out into the street, resulting in a taking over of the street and precipitating acts of mob violence, differentiates it from the completely peaceful conduct involved in the **Cox v. New Hampshire** case, 312 U. S. 569, *supra*. It also illustrates the very critical danger this Honorable Court warned against in **Cox v. State of Louisiana**, 379 U. S., at page 554, 85 S. Ct. 464:

"The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A re-

striction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."

Mr. Justice Black expressed the same warning in his dissenting opinion in **Cox v. Louisiana**, concerning picketing or marching, especially to or in the vicinity of a court house, when he said (379 U. S. 584, 85 S. Ct. 671):

> "Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow."[7]

It is appropriate to note that the City Hall is a combined City Hall and Court House in which is located the Recorders Courts. Mr. Justice Brennan, in his dissent in **Walker**, says that the march was to the City Hall. 388 U. S. 341, 87 S. Ct. 1842. This brings the instant case directly within the dissenting opinions in **Cox v. Louisiana** (No. 49), banning picketing and parading near a court house. See Opinion of Mr. Justice Black, joined by Mr. Justice White and Mr. Justice Harlan, 379 U. S. 581-585,

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[7] These words of Mr. Justice Black in January 1965 were prophetic of what has happened in 1965 and the years that have followed. The streets of many cities have become battlegrounds. Arson, looting, sniping have mounted every year: In 1965 there were 5 riots; in 1966 20 riots; in 1967 76 riots; during these riots 12 law officers and 118 civilians were killed; civilians injured were 2424; cases of arson 7985; cities where rioters interfered with firemen 66; cities where rioters included snipers 38; estimated property loss $504,200,000. Please see Report on Riots, Civil, Criminal Disorders—Hearings Before the Permanent Sub-Committee Investigations of the Committee on Government Operations, United States Senate, Part I, Charts, at page 14. Riots, looting, arson, sniping, with their toll of property damage, personal injuries and death, continue to mount in 1968 and apparently will far exceed any prior year.

B.

Petitioner Could Not With Impunity Presume at the Time He Participated in the Enjoined March Which Violated Section 1159 That the Supreme Court of Alabama Could Not or Would Not Construe Section 1159 to Require a Narrow, Precise and Non-Discriminatory Exercise of Discretion in the Issuance or Denial of the Permit.

In arguing that he was free to ignore Section 1159 because of its alleged facial unconstitutionality in that it vested an unbridled discretion in the Commission to grant or not to grant a permit, petitioner has relied upon many cases that have no relevance to the point. It must be remembered that Section 1159 is obviously aimed at the regulation of the use of the City streets and ways of the City of Birmingham for the safety and convenience of its citizens. The activities covered by Section 1159 may or may not have as their purpose the communication of ideas or philosophies. But in all cases the orderly use of such streets for the safety and convenience of the public is a legitimate and proper concern of municipal authorities. Such activities all involve "speech plus" and not merely "pure speech".

There can be no doubt that Section 1159 gave petitioner "fair notice" that to participate in a parade without a permit was proscribed, and the construction placed on Section 1159 by the Alabama Supreme Court is as valid as if said ordinance had been amended by the City governing body prior to petitioner's arrest and conviction. The case of **Winters v. New York**, 333 U. S. 507, 68 S. Ct. 665, authoritatively establishes this point. The **Winters** case involved an arrest and conviction of petitioner prior to the State Court's interpretation of its obscenity statute, the basis for the charge against petitioner. The effect of

the State Court's construction of the statute was discussed at 333 U. S., pages 514, 515, 68 S. Ct. 669, 670:

> "The Court of Appeals by this authoritative interpretation made the subsection applicable to publications that, besides meeting the other particulars of the statute, so massed their collection of pictures and stories of bloodshed and lust 'as to become vehicles for inciting violent and depraved crimes against the person'. Thus, the statute forbids the massing of stories of bloodshed and lust in such a way as to incite to crime against the person. **This construction fixes the meaning of the statute for this case. The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature.** Hebert v. State of Louisiana, 272 U. S. 312, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 ALR 1102; Skiriotes v. Florida, 313 U. S. 69, 79, 61 S. Ct. 924, 930, 85 L. Ed. 1193. **We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation.** Compare Lanzetta v. State of New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888." (Emphasis supplied.)

The **Winters** case is conclusive to the effect that a State Court can place a limiting construction upon enactments that might be equally susceptible of an overbroad or vague construction, and the statute as so construed becomes the statute in such case. **Winters** also makes it clear that the enactment can be construed after conviction of defendant and in the same case. The **Winters** case, as does respondent herein, recognizes that the enactment as written must give "fair notice" as required by "due process". This, however, is of no great moment in this instance because as noted earlier in II-A, the first paragraph of Section 1159 meets the burden of "fair notice".

Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762, is squarely in point, both as to law and facts, insofar as

85 S. Ct. 470-472; Mr. Justice Clark, 379 U. S. 585-587, 85 S. Ct. 472-473.

In closing Part I, we respectfully contend this Honorable Court's opinion in **Walker**, written by Mr. Justice Stewart, was correct when he said, "Here, just as in Cox and Poulos, it could not be assumed the ordinance was void on its face." In an article appearing in The Supreme Court Review (1967), written by Sheldon Tefft, James Parker Hall, Professor of Law of Chicago University, entitled "Neither Above The Law Nor Below It, A Note On Walker Vs. Birmingham", in which he agrees with the majority opinion, he uses the expression, "The ordinance does not seem to be obviously void." This simply means that 1159, as written, was open to the narrowing interpretation placed upon it by the Alabama Supreme Court appropriately restricting the scope of discretion vested in the City Commission and/so construed is binding upon petitioner and sustains his conviction for its violation.

II.

Petitioner Had Fair Notice as Acquired by Due Process of Law.

A.

Petitioner Had Fair Notice Within the Rules of Lanzetta and Bouie.

Under Section II of petitioner's argument, he contends that his conviction must be reversed because it imposes criminal liability upon him without the fair notice required by due process of law. In support of this contention he cites **Lanzetta v. New Jersey**, 306 U. S. 451, 59 S. Ct. 618; and **Bouie v. City of Columbia**, 378 U. S. 347, 84 S. Ct. 1697.

Lanzetta involved an enactment that made it an offense for anyone who had been convicted three times of being a disorderly person to be a member of any gang "consisting of two or more persons". Since the only purported definition of "gang" was found in that phrase in the statute reading: "consisting of two or more persons", this Court correctly held that defendant had not received fair notice.

The rule found in **Lanzetta v. New Jersey**, 306 U. S., at page 453, 59 S. Ct., at page 619, is discussed as follows:

> "The applicable rule is stated in Connally v. General Const. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The enactment in **Bouie** proscribed going upon the lands of another after notice not to do so. The enactment provided for notice by posting a notice "in four conspicuous places on the borders of such land prohibiting entry thereon. . . ."

It is obvious under this enactment that the warning must precede the trespass. The facts, however, upon which petitioners were convicted did not reveal any advance warning, and it was only after construction by the Supreme Court of South Carolina that anyone had notice that a conviction could be had on notice given subsequent to the entry.

The facts in **Bouie** reveal that Negroes, as invitees, entered a drug store in Columbia, South Carolina. They were invited to all departments in the store except the restaurant portion. On this occasion the petitioners sat in a booth in the restaurant area, and were subsequently told to leave. Upon their refusal they were arrested and convicted under the trespass statute referred to above.

This Honorable Court, after pointing out that the South Carolina statute could be distinguished from the gangster statute in **Lanzetta** because the trespass enactment was not vague and uncertain but "was admirably narrow and precise", nevertheless held it did not meet the fair notice requirement of due process. In this regard, this Court said, in **Bouie v. City of Columbia**, 378 U. S., at page 352; 84 S. Ct., at pages 1701, 1702:

> "The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to the coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes', as in Lanzetta, or to 'guess at [the statute's] mean-

ing and differ as to its application', as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

It is readily apparent that Section 1159 does no violence to the fair notice requirement of due process. The first paragraph of Section 1159 is the proscribing part and certainly affords fair notice that participating in a parade without a permit is proscribed. This paragraph reads:

"Sec. 1159. Parading.

"It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the Commission."

Section 1159 is not vague so as to require speculation as to its meaning, as in **Lanzetta**, and it is not necessary to " 'guess at [its] meaning and differ as to its application', as in Connally". The construction the Alabama Supreme Court placed on Section 1159 in no way changed the first paragraph of that section. The limiting effect of that Court's construction related solely to the administrative procedures required by Section 1159. There was no effort to enlarge the scope of the proscription of 1159 by the Alabama Supreme Court. The first paragraph, which actually sets out the offense and gives notice of the proscription involved, remained the same before and after construction. Thus, it is clear that Section 1159 does afford the fair notice required by the due process clause of the Constitution. It certainly complies with the rule announced by **Lanzetta** and **Bouie**.

establishing the right of the Alabama Supreme Court to construe Section 1159 following petitioner's arrest and conviction. In fact, the New Hampshire statute which regulated parading, did not even purport to establish standards for the issuance or denial of the permit prior to its construction by the State court. Nevertheless, this Court in a unanimous opinion upheld the validity of the New Hampshire statute as construed.

In **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, involving an appeal from a contempt of court conviction for parading in violation of Section 1159, this Honorable Court specifically noted that Section 1159 could be subjected to a narrowing construction, and in effect invited such construction by the State Court. This Court in **Walker** pointed out that the State "courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as did the New Hampshire courts in Cox v. State of New Hampshire and Poulos v. State of New Hampshire, . . ."

In **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211, this Court reaffirmed the principle of **Winters** and **Cox. Shuttlesworth** involved the validity of an ordinance which was construed by the State court to save it from attack as unconstitutional.[8] This construction came after conviction of the defendant.

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[8] This is made clear in Mr. Justice Brennan's concurring opinion, 382 U. S., at page 99: "I join the Court's opinion on my understanding that Middlebrooks v. City of Birmingham is being read as holding that Section 1142 applies only when a person: (a) stands, loiters or walks on a street or sidewalk so as to obstruct free passage, (b) is requested by an officer to move on, and (c) thereafter continues to block passage by loitering or standing on the street. **It is only this limiting construction which saves the statute from the constitutional challenge that it is overly broad.** Moreover, because this construction delimits the statute to 'the sort of "hard-core" conduct that would obviously be prohibited under any construction', Dombrowski v. Pfister, 380 U. S. 479, 491-492, 85 S. Ct. 1116, 1124, 14 L. Ed. 2d 22, **it may be legitimately applied to such conduct occurring before that construction**" (Emphasis added).

C.

Cases Relied Upon by Petitioner Cited in Part I and Referred to in Part II of His Brief Are Not in Point. These Cases Did Not Teach Petitioner That He Could Ignore Section 1159.

These cases, so petitioner argues, have the effect of teaching him that he could ignore the permit requirement of such ordinance and therefore he has been denied due process in that he did not have "fair notice" at the time he defied the state court injunction which enjoined him from participating in a mass parade or procession without applying for a permit as required by Section 1159. We shall undertake to show that these cases are not applicable and shall deal with them as groups or individually.

The cases erroneously relied upon by petitioner are divided into groups as follows: (a) "The Movie Censorship Cases", (b) Distribution of Literature and Solicitation Cases, (c) Public Assembly Cases, and (d) The Remaining Cases.

(a)

The Movie Censorship Cases.

Petitioner cites the following cases, all involving the validity of enactments creating movie review boards to censor movies prior to their presentation to the public. **Interstate Circuit, Inc. v. City of Dallas**, 20 L. Ed. 2d 225; **Joseph Burstyn, Inc. v. Wilson**, 343 U. S. 495, 72 S. Ct. 777; **Gelling v. Texas**, 343 U. S. 960, 72 S. Ct. 1002; **Superior Films, Inc. v. Department of Education**, 346 U. S. 587, 74 S. Ct. 286; **Commercial Pictures Corp. v. Regents**, 346 U. S. 587, 74 S. Ct. 286; **Holmby Production, Inc. v. Vaughn**, 350 U. S. 870, 76 S. Ct. 117; **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734.

The movie censorship cases all involve the regulation of pure speech and as such are subject to a very limited amount of regulation by the state. In fact, Mr. Justice Black and Mr. Justice Douglas are of the opinion that all censorship of movies violates the First Amendment and they "would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment". **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734; and **Interstate Circuit, Inc. v. Dallas**, 20 L. Ed. 2d 225. In contrast, Mr. Justice Black would not afford First Amendment protection to those who parade on the streets. In **Amalgamated Food Emp. U. Local 590 v. Logan Valley Plaza**, 88 S. Ct. 1601, he said: "And of course picketing, that is patrolling, is not free speech and not protected as such." See also **Cox v. Louisiana**, 379 U. S., at page 578.

The movie censorship cases all involve enactments directed to the regulation of pure speech. Section 1159 regulates speech only incidentally to its regulation of traffic. The act of parading involves elements of both speech and conduct, i. e., patrolling or marching, and can be subjected to controls that would not be constitutionally permissible in the case of pure speech. **Amalgamated Food Emp. U. Local 590 v. Logan Valley Plaza**, 88 S. Ct. 1601 (1968).

It should also be noted that insofar as these cases are concerned, they could not teach petitioner that he could presume Section 1159 was unconstitutional prior to its construction by the Alabama Supreme Court. This Honorable Court, in **Interstate Circuit, Inc. v. City of Dallas**, 20 L. Ed. 2d 225, at least inferentially recognized the right of the state courts to construe such censorship enactments after the act of censoring. This follows from this Court's apparent recognition that the State Court could have narrowly defined the ordinances dealt with in **Interstate**. "Nor did the Court of Civil Appeals pro-

vide much enlightenment or a narrowing definition of the ordinances."

Thus, the State Courts are even permitted to construe enactments creating censorship boards, which are the most flagrant prior restraints of speech, and such construction will prevail in this Court. Certainly, a State Court's limiting construction of an ordinance regulating the use of the streets for the benefit, safety and convenience of the public ought to be anticipated by one who violates its plain proscription, as did petitioner herein.

(b)

Distribution of Literature and Solicitation Cases.

Petitioner cites the following cases, all either involving the validity of enactments regulating the distribution of handbills and pamphlets, or the solicitation of funds or members for various causes.

Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666; **Schneider v. New Jersey**, 308 U. S. 147, 60 S. Ct. 146; **Largent v. Texas**, 318 U. S. 418, 63 S. Ct. 667; **Jones v. Opelika**, 316 U. S. 584, 62 S. Ct. 1231, vacated by 319 U. S. 103, 63 S. Ct. 890; **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277; **Cantwell v. Connecticut**, 310 U. S. 296, 60 S. Ct. 900; **Hague v. C. I. O.**, 307 U. S. 496, 59 S. Ct. 954; **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274.

The foregoing cases, like the movie censorship cases, also involve pure speech, and as such may not be regulated as would be permissible in cases wherein the speech is intermingled with conduct. **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (1968).

In **Lovell v. Griffin**, 303 U. S. 444, 58 S. Ct. 666, an attempt was apparently made to inject conduct into the act

of passing out literature on the theory that the enactment regulated only the distribution and not the publication. This theory was rejected by this Court:

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value!"

Shortly after **Lovell v. Griffin**, *supra*, was decided, this Court decided the case which respondent conceives to be identical to the instant case, i. e., **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762. In **Cox v. New Hampshire**, *supra*, this Honorable Court upheld the validity of an enactment, virtually the same as Section 1159, except the statute in **Cox** was completely without any standards governing the discretion of the administrative officer charged with issuance of permits until the New Hampshire Supreme Court narrowly limited such discretion in the same case for which petitioner there was arrested. This Honorable Court sustained the convictions of petitioner Cox, and upheld the statute as construed by the New Hampshire Court. This Court, in its **Cox v. New Hampshire** decision, cited **Lovell v. Griffin**, *supra*; **Schneider v. State**, 308 U. S. 147, 60 S. Ct. 146; **Hague v. C. I. O.**, 307 U. S. 496, 59 S. Ct. 954; and **Cantwell v. Connecticut**, 310 U. S. 296, 60 S. Ct. 900. Since this Court approvingly cited **Lovell**, **Hague**, **Schneider** and **Cantwell** in **Cox v. New Hampshire**, *supra*, the only conclusion that can be drawn is that the Court found those cases not to be in conflict with the holding in **Cox**.

The only cases set out under "(b)" above that were not considered in **Cox v. New Hampshire**, *supra*, are **Largent v. Texas**, 318 U. S. 418, 63 S. Ct. 667; **Jones v. Opelika**, 316 U. S. 584, 62 S. Ct. 1231, vacated by 319 U. S. 103, 63 S. Ct. 890; and **Staub v. City of Baxley**, 355 U. S. 313, 78

S. Ct. 277, all of which stand for the **Lovell v. Griffin** principle, which was found to be not in conflict with **Cox**, and all of which were decided after **Cox**; and also two other cases, **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274, which were also decided after **Cox** but involved completely different principles. These two cases will be dealt with later at page 49.

Cox v. New Hampshire, *supra*, did not involve pure speech, and as the statute was construed it did not vest an unbridled discretion in state authorities to either issue or deny the parade permit.

It should be noted that except for **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274; all of the cases listed under "(b)" above, as well as **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 312, and **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325, listed under "(c)" below, were cited in **Staub v. City of Baxley**, 355 U. S. 313, 78 S. Ct. 277, because the enactments as construed by the State courts left the exercise of First Amendment rights in the unbridled discretion of the official charged with granting the permit. It should also be noted that the enactments involved in those cases did not regulate conduct such as marching or picketing. It therefore clearly appears that unbridled discretion in "pure speech" or "freedom of association" situations is the critical point of **Staub v. Baxley**, 355 U. S. 313. That case, at U. S., page 322, cites the cases referred to above as involving the same constitutional question:

> "In Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, this Court held invalid an act which proscribed soliciting money or any valuable thing for 'any alleged religious, charitable or philanthropic cause', Gen. St. 1930, Sec. 6294, un-

less the 'cause is approved by the secretary of the public welfare council of the state'. Speaking for a unanimous Court, Mr. Justice Roberts said: 'It will be noted, however, that the act requires an application to the secretary of the public welfare council of the state; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion . . . is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

"'[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.' 310 U. S., at pages 305, 307, 60 S. Ct. at page 904. To the same effect are Lovell v. City of Griffin, supra, 303 U. S. at pages 451, 452, 58 S. Ct. at pages 668, 669; Hague v. C. I. O., 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; Schneider v. State of New Jersey, Town of Irvington, 308 U. S. 147, 163, 164, 60 S. Ct. 146, 151, 152, 84 L. Ed. 155; Largent v. State of Texas, 318 U. S. 418, 422, 63 S. Ct. 667, 669, 87 L. Ed. 873; Jones v. City of Opelika, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290, adopting *per curiam* on rehearing the dissenting opinion in 315 U. S. 584, 600-602, 62 S. Ct. 1231, 1240, 1241, 86 L. Ed. 1691; Niemotko v. State of

Maryland, 340 U. S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267; Kunz v. People of State of New York, 340 U. S. 290, 293, 71 S. Ct. 312, 314, 95 L. Ed. 280."

It should also be noted that in each of such cases cited in **Staub** the particular ordinance or statute was reviewed in the United States Supreme Court and held invalid after construction in the respective state courts. These cases may be further distinguished from the instant case. Here, Section 1159 as construed by the Alabama Supreme Court is unquestionably valid. It does not involve "pure speach" or "freedom of association" but is confined to safety and convenience in the use of the streets and ways of the City. This latter distinction is made clear in **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453, at U. S. pages 553, 554, S. Ct. page 464, wherein Mr. Justice Goldberg said:

> "Appellant, however, contends that as so construed and applied in this case, the statute is an unconstitutional infringement on freedom of speech and assembly. This contention on the facts here presented raises an issue with which this Court has dealt in many decisions, that is, the right of a state or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly. See Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; Largent v. State of Texas, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Kovacs v. Cooper,

336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513; Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325, 328, 95 L. Ed. 267, 280; Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280; Poulos v. State of New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105.

"From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection . . ."

The remaining two cases under "(b)" are **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276; and **Tucker v. Texas**, 326 U. S. 517, 66 S. Ct. 274.

Each of these cases involved the arrest and conviction of members of the sect known as "Jehovah's Witnesses" for the dissemination of their views in a private company owned town and a Federal housing project respectively, in violation of their First Amendment freedoms. The charge in effect in each case was "Trespass After Warning".

The focal point in issue in each case was the authority or right of the person in charge of the properties to exclude those whom they did not want from such property

to the complete loss of their freedom of speech and religion.

Nothing in either of these cases teaches petitioner herein that he could ignore ordinances regulating the use of the streets for the safety and convenience of all the citizens.

(c)

Public Assembly Cases.

The following cases all involve the regulation of public assemblies. The enactments involved are different and have different purposes, but each in its own way was applied to regulate a public assembly.

Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148; **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 312; **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325.

Petitioners in the three cases above were convicted for holding public assemblies. The thrust of the proscription in each case is different but all vested an unbridled discretion in the state to grant or deny the right of "public assembly". These cases are such that the justification for the state's regulation was outweighed by the interest represented by the First Amendment liberty involved.

Saia v. People of State of New York, *supra*, involved an enactment that proscribed the use of radios, loudspeakers, etc., in such a manner that other people were annoyed. Section 3 of the enactment reads as follows:

> "Section 3. Exception.—Public dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities, shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

Petitioner in **Saia** was a Jehovah's Witness minister who lectured over a loudspeaker in a city park on Sundays. When the permit for such activity expired, he made application for a new permit. His application was denied because of alleged annoyance to certain people in the vicinity of the park. Petitioner then conducted lectures without benefit of the permit and was arrested and convicted.

This Court held that after construction by the state court Section 3 of the act vested an unbridled discretion in the Chief of Police to either grant or deny permission to use the park for public assembly.

To demonstrate the firm entrenchment of the rules relating to the regulation of pure speech, we quote from Mr. Justice Douglas, speaking for the Court at 334 U. S., page 561, 68 S. Ct., page 1150:

> ". . . Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case, and freedom of speech and assembly in the Hague case."

Following this statement the Court in **Saia**, 334 U. S. 558, 68 S. Ct. 1148, in a footnote at U. S. Page 561, Mr. Justice Douglas speaking for the Court, recognized that **New Hampshire Cox** is not inconsistent with these rules, but is merely an application of the same rules to a properly construed enactment regulating the use of the streets. The footnote is number 2 and reads:

> "Cox v. New Hampshire, 312 U. S. 569, 577, 578, 61 S. Ct. 762, 763, 85 L. Ed. 1049, 133 ALR 1396, did not depart from the rule of these earlier cases but reemphasized the vice of the type of ordinance we have here. Davis v. Massachusetts, 167 U. S. 43, 17 S. Ct. 731, 42 L. Ed. 71, was distinguished in the Hague

case, 307 U. S. pages 514-516, 59 S. Ct. pages 963, 964, 84 L. Ed. 1423, which likewise involved an ordinance regulating the use of public streets and parks. It was there said, 'We have no occasion to determine whether, on the facts disclosed, the Davis case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied'.

"We adhere to that view. Though the statement was that of only three Justices, it plainly indicated the route the majority followed, who on the merits did not consider the Davis case to be controlling."

The case of **Kunz v. New York**, 340 U. S. 290, 71 S. Ct. 312, involved an ordinance that proscribed public worship meetings on the streets without first obtaining a permit from the city police commissioner.

The facts reveal that petitioner, an ordained Baptist minister, obtained the required permit for the year of 1946. This permit was revoked in November 1946 because "he had ridiculed and denounced other religious beliefs in his meetings". Petitioner continued to speak without the permit until his arrest in September 1948.

The only issue before the Court was the speech activity of 1948. The defendant was not charged for any prior years. This Court held the ordinance vested an unbridled discretion in the police commissioner to either grant or deny the permit:

> "Disapproval of the 1948 permit application by the police commissioner was justified by the New York courts on the ground that a permit had previously been revoked 'for good reason'. It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. This interpretation allows the police commissioner, an administrative official, to exercise discretion in denying subsequent permit applications on the basis of his interpretation, at that time of what is deemed to be conduct condemned by the ordinance. We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights."

After determining that the enactment was void as a prior restraint on the exercise of First Amendment freedoms, the Court specifically pointed out that First Amendment liberties could nevertheless be regulated to prevent serious interference with normal usage of streets and parks:

> "**Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks,** Cox v. State of New Hampshire, 1941, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon **broad criteria unrelated to proper regulation of public places.**" (Emphasis ours.)

Petitioners in **Niemotko v. Maryland**, 340 U. S. 268, 71 S. Ct. 325, were Jehovah's Witnesses who conducted religious services in a public park and were convicted for disorderly conduct. These petitioners were denied permits on several occasions, but on the third Sunday following denials of permits for the preceding Sundays, petitioners conducted the meetings without benefit of permit. In this case there was no statutory authority requiring a permit, but a custom existed whereby the Park Commissioner issued such permits. The arrest and convictions was for disorderly conduct based upon the absence of a permit. The conviction was overturned because the inevitable result was to place an absolute prohibition upon pure speech in the particular situation. It did not involve regulation of picketing or parading on the streets or public ways and has no application to this case. In fact, it notes and distinguishes **New Hampshire Cox**, as we have previously noted at page 31 of this brief.

(d)

The Remaining Cases.

The only remaining cases cited by petitioner in support of his theory that Section 1159 is facially void and therefore he could ignore the permit requirement are **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Shuttlesworth v. City of Birmingham**, 382 U. S. 87, 86 S. Ct. 211. **Cox v. Louisiana**, *supra*, has been dealt with at length in this brief at pages 33-35 and will not be discussed further at this point.

Shuttlesworth did not involve speech, either mixed or pure. It was a "due process" case relating to "fair trial". It turned on the question of whether the trial court based it decision on the subsequent construction of Section 1142 or as that section read prior to construction. The ordinance as written was in the alternative and proscribed

blocking the sidewalk and also failing to move on after a request by a police officer. The complaint filed by the city also charged the offense in the alternative. After petitioner's conviction the Appellate Court, in a different case, construed that section to require proof of both blocking the sidewalk and refusal to obey the lawful command of an officer. This Court accepted that construction to validate the ordinance but concluded that it was possible that the trial judge may have convicted solely on evidence relating to blocking the sidewalk and not on evidence that petitioner refused to obey the officer; or to the contrary he may have convicted because the defendant refused to obey the officer and at the same time have found the evidence did not establish that the defendant blocked the sidewalk. This Court reached this conclusion because the trial court, at the time of the trial, did not have benefit of the Court's construction. Thus, it is clear that this case has no relevance to the instant case.

D.

Raley v. Ohio, 360 U. S. 423, 79 S. Ct. 1257; Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731; Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772; O'Connor v. Ohio, 385 U. S. 92, 87 S. Ct. 252; and James v. United States, 366 U. S. 213, 81 S. Ct. 1052, Have No Relevance to the Instant Case.

The cases set out above are completely without relevance insofar as the instant case is concerned. **Linkletter, Johnson** and **O'Connor** simply held that cases such as **Mapp v. Ohio**, 367 U. S. 643; **Escobedo v. Illinois**, 378 U. S. 478; **Miranda v. Arizona**, 384 U. S. 436; and **Griffin v. California**, 380 U. S. 609, which cases established new rules of criminal procedure and overturned prior procedures legally relied upon by public officials until these cases were decided, would not be given retroactive effect.

The facts in **Raley v. Ohio**, 360 U. S. 423, established that the Ohio Un-American Activities Commission misled petitioners into the belief that said petitioners did not have to testify before said Commission, but could rely on their constitutional right against self-incrimination. Petitioners took the Commission at its word and refused to testify. They were subsequently cited for contempt by said Commission and convicted because Ohio by statute granted immunity to persons testifying before said Commission.

This is entrapment in its classic form, and of no relevance to the issues involved here. Petitioner wasn't told, and had no reason to believe that he could parade without the permit. In fact, **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, taught him he must secure said permit.

In **James v. United States**, 366 U. S. 213, petitioner was convicted of willfully attempting to evade federal income taxes. The taxes he attempted to evade were those alleged to be owed on funds embezzled that year. A prior decision of this Honorable Court had held that embezzled funds are not to be included in the taxable income of the embezzler in the year in which they are misappropriated. **James** overruled this decision, thereby making such embezzled funds taxable, but reversed petitioner's conviction.

This case is not in point because **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, decided over a quarter of a century ago by a unanimous court, and many times by this Honorable Court approved in a line of cases, the most recent one being **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (May 20, 1968), continues to stand for the proposition that persons who desire to parade or march along city streets may properly be required to secure a permit in order that municipal authorities be able to limit the amount of interference with use of the sidewalks by other members of the public

by regulating the time, place and manner of the parade or march. In no event can petitioner complain he was not fully advised by this Honorable Court by the teaching of **Cox** and the many cases reaffirming it of the consequences of his illegal conduct in this case.

E.

Petitioner Had Fair Notice That His March in Formation Along the Sidewalk Was a Parade or Procession Within the Proscription of Section 1159.

Petitioner also contends that Section 1159 fails to give "fair notice" because although clear on its face that parades were proscribed, petitioner could not be expected to know that his march down the sidewalk would be treated as such. He contends that he could not know either that his march was of a type proscribed or that such march taking place on the sidewalk was proscribed. These contentions, however, ignore the teaching of **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, which should have taught petitioner that a march such as his was within the proscription of Section 1159, even though it took place on the sidewalk. **Cox v. New Hampshire**, *supra*, involved a sidewalk march involving a smaller group than in this case. In **Cox v. New Hampshire**, *supra*, a unanimous Court said:

> "There appears to be no ground for challenging the ruling of the state court that Appellants were in fact engaged in a parade or procession upon the public streets. As the state court observed: 'It was a march in formation, and its advertising and informatory purpose did not make it otherwise. . . . It is immaterial that its tactics were few and simple. It is enough that it proceeded in ordered and close file as a collective body of persons on the city streets'."

Cox v. New Hampshire, *supra*, representing for over twenty-five years the law in this field, should have been sufficient notice to petitioner that his conduct was proscribed. However, in this instance there was direct evidence that petitioner was on notice and knew his conduct was in violation of Section 1159. Mr. Justice Stewart, in **Walker v. City of Birmingham**, 388 U. S. 307, 310, 87 S. Ct. 1824, makes this clear when he discussed a press release issued by four of the petitioners in **Walker**, including, we interpolate, Rev. F. L. Shuttlesworth, in which they announced their decision to march in spite of an injunction forbidding parading without a permit as required by this ordinance (388 U. S., at page 310).

> "That night a meeting took place at which one of petitioners announced that 'injuction or no injunction we are going to march tomorrow'. The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by 'clapping and hollering and (w)hooping'. Some of the crowd followed the marchers and spilled out into the street . . ."

In fact, one of the chief issues involved in **Walker** was whether petitioners, including the Rev. F. L. Shuttlesworth, violated an injunction restraining petitioners, including Rev. Shuttlesworth, from participating in or encouraging mass street parades or processions without a permit as required by Section 1159, when they participated in the same parade for which petitioner was arrested in the instant case. This Court, in **Walker**, concluded that petitioners had violated the injunction by this march without a permit, and upheld petitioner's conviction for contempt.

In addition to **Cox v. New Hampshire**, *supra*, respondent finds that the General City Code of Birmingham of 1944

also teaches petitioner that a march down the sidewalk is a march within the street. "Sidewalk" is defined in Section 2 of the General City Code of Birmingham of 1944:

> "Sec. 2. Definitions and rules of construction.
>
> In the construction of this code and of all ordinances, the following definitions and rules shall be observed, unless the context clearly requires otherwise. . . .
>
> Sidewalk. The term 'sidewalk' shall mean that portion of a street between the curb line and adjacent property line."

III.

It Is Not Necessary That Section 1159, as Construed Provide for a Prompt Administrative Proceeding and Judicial Review If the Permit Required by Section 1159 Is Denied. A "Motion to Dissolve" the Injunction Pending at the Time of Petitioner's Parade Without a Permit or "Mandamus" to Compel the Issuance of Said Permit Are Adequate.

A.

Only Enactments That Censor the Content of Speech Must Provide for Both a Prompt Administrative Proceeding and Judicial Review.

Petitioner argues that Section 1159, as construed by the Alabama Supreme Court, is unconstitutional because it does not contain procedural safeguards designed to obivate the dangers of a censorship system. He contends that the porcedural safeguards to be adequate must provide for both a prompt administrative proceeding and a prompt judicial review if such permit is denied. In support of this argument, petitioner relies upon **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734; **Teitel Film Corp. v. Cusack**, 390 U. S. 139, 88 S. Ct. 754; and **Bantam Books, Inc. v. Sullivan**, 372 U. S. 58, 83 S. Ct. 631.

The rule announced in **Freedman, Teitel** and **Bantam** applies only to censorship and not to enactments regulating the use of the streets. Insofar as we can determine from exhaustive research, this rule has only had application when the content of speech, i. e., the content of books and movies, is subjected to censorship prior to its dissemination or showing. This rule obtains where the vice of a statute is that it delegates "excessive discretion" upon a censorship board. In **Freedman v. Maryland**, 380 U. S., at pages 56 and 57, Mr. Justice Brennan speaking for the Court said:

> "Although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute, we think that appellant's assertion of a similar danger in the Maryland apparatus of **censorship**—one always fraught with danger and viewed with suspicion—gives him standing to make that challenge. In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the **censor's** action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion" (Emphasis added).

Respondent does not disagree with the above conclusion that the vice of statutory delegation of excessive administrative discretion and the vice of censorship without prompt administrative and judicial review are similar. Respondent does argue, however, that Section 1159 is not infected with either vice. The Supreme Court of Alabama in the instant case correctly pointed out at 206 So. 2d, page 350, that under the provisions of Section 1159 "[t]he members of the Commission may not act as censors of what is to be said or displayed in any parade". It is thus clear that **this enactment is not cen-**

sorship. Nor is Section 159 infected with the vice of conferring excessive administrative discretion upon the City Commission. The administrative discretion conferred upon the Commission was limited to the same extent as was the discretion to grant or deny parade permits conferred by the statute in **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762, which this Court held did not confer excessive discretion. This point is dealt with in greater detail in Part I of Respondent's brief. In contrast, this Court in **Cox v. New Hampshire**, 312 U. S. 569, *supra*, recognized that cases such as **Lovell v. Griffin**, 303 U. S. 444; and **Schneider v. New Jersey**, 308 U. S. 147, involved enactments that did confer excessive discretion in free speech situations, and therefore were not relevant. In neither cases such as **Lovell v. Griffin**, *supra*, and **Schneider v. New Jersey**, *supra*, wherein the enactments involved did confer excessive discretion to deny speech, nor in cases such as **Cox v. New Hampshire**, *supra*, and the instant case, wherein the statutes did not confer excessive discretion in this regard, has this Honorable Court required that statutory provisions afford both a prompt administrative and judicial review. These procedures are only required when the enactments involved purport to control or censor what may be said.

There can be no doubt that enactments, such as Section 1159, focused on the safe and convenient use of the streets and sidewalks, deal with conduct that may or may not be intermingled with speech, and are not subject to the same restrictions as enactments that regulate pure speech. **Amalgamated Food Employees, etc. v. Logan Valley Plaza, Inc.**, 88 S. Ct. 1601 (1968); **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453. Enactments such as Section 1159 which regulate "speech plus" have never been construed by this Court to require the same procedural safeguards as statutes which censor the content of pure speech. Cases such as **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734;

Teitel Film Corp. v. Cusack, 390 U. S. 139, 88 S. Ct. 754; and **Bantam Books, Inc. v. Sullivan**, 372 U. S. 58, 83 S. Ct. 631, all involve enactments aimed at the censorship or control of the content of speech. Section 1159 is an enactment designed to regulate parades on the streets, but when such parades manifest elements of speech, it is speech intermingled with conduct. However, the permit required cannot be used to censor what may be said or displayed in any parade. **Shuttlesworth v. Birmingham**, 206 So. 2d, at page 350, makes it clear that "the Commission may not act as censors of what is to be said or displayed in any parade".

It is equally obvious that this Honorable Court considered the procedures we discuss herein to only have application to censorship systems. This is made clear in **Freedman v. Maryland**, 380 U. S., at pages 57, 58, 85 S. Ct., at page 738, when the Court observed that it was there dealing with a censorship system:

> ". . . The administration of a **censorship system** for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a **censorship proceeding** puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interest in free expression. And if it is made unduly onerous by reason of delay or otherwise to seek judicial review, the **censor's** determination may in practice be final.
>
> "[7-13] Applying the settled rule of our cases, we hold that **a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.**" (Emphasis supplied.)

The reasons behind the requirement that enactments creating censorship systems must provide both a prompt administrative proceeding and a prompt judicial review do not exist where a narrowly drawn enactment confers a properly limited administrative discretion on one charged with issuing a parade permit. The question of what can be said and what cannot be said is by its very nature a subject that should be judicially determined. The same considerations obviously do not enter into the issuance or denial of a permit to parade upon the streets. Only traffic conditions and safety and convenience of the public in the use of the streets, including sidewalks, are to be considered in determining whether to issue or deny the permit, and then if a denial is justified such justification only exists until the conditions change and then the permit must issue. Censorship systems clearly call for a judicial review, but enactments such as 1159 call only for an adminstrative determination within very narrowly circumscribed limits. For convenience, we have set forth Section 1159 as originally written and as construed by the Alabama Supreme Court in the Appendix hereto, at pages 70 and 71, respectively.

B.

Mandamus and in This Case a Motion to Dissolve the Injunction Provide Adequate Procedures for the Review of Denials of Permits Required by Section 1159.

Petitioner also argues that the procedures afforded by law to review the denial of his application for a parade permit are not adequate. Even in the absence of petitioner's pending action, i. e., the Ex parte injunction which permitted a ready review of any denial of a parade permit by motion to dissolve such injunction, he had an adequate method of review. The case of **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760, stands as posi-

tive authority that the normal procedures provided by state law are sufficient.

Petitioner in **Poulos** made application for a permit to hold a religious meeting in a public park as required by statute. His application was denied and he was subsequently convicted for holding such meeting without a permit. The Supreme Court of New Hampshire determined that the permit had been arbitrarily and unlawfully denied, but nevertheless upheld petitioner's conviction because petitioner chose to violate a proper and narrowly construed enactment rather than pursue his legal remedy to compel issuance of the license. This Court upheld petitioner's conviction and agreed that his only lawful recourse was to compel the issuance of this license. In this regard, this Honorable Court, at 345 U. S., pages 408, 409, 73 S. Ct., at pages 768, 769, said:

> "Second. New Hampshire's determination that the ordinance is valid and that the Council could be compelled to issue the requested license on demand brings us face to face with another constitutional problem. May this man be convicted for holding a religious meeting without a license when the permit required by a valid enactment—the ordinance in this case—has been wrongly refused by the municipality?
>
> "Appellant's contention is that since the Constitution guarantees the free exercise of religion, the Council's unlawful refusal to issue the license is a complete defense to this prosecution. His argument asserts that if he can be punished for violation of the valid ordinance because he exercised his right of free speech, after the wrongful refusal of the license, the protection of the Constitution is illusory. He objects that by the Council's refusal of a license, his right to preach may be postponed until a case, possibly after years, reaches this Court for final adjudication of constitutional rights. Poulos takes the position

that he may risk speaking without a license and defeat prosecution by showing the license was arbitrarily withheld.

"[8-10] It must be admitted that judicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. But to allow applicants to proceed without the required permits to run businesses, erect structures, purchase firearms, transport or store explosives or inflammatory products, hold public meetings without prior safety arrangements or take other unauthorized action is apt to cause breaches of the peace or create public dangers. The valid requirements of license are for the good of the applicants and the public. It would be unreal to say that such official failures to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution. Delay is unfortunate but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning. Nor can we say that a state's requirement that redress must be sought through appropriate judicial procedure violates due process."

Respondent can find nothing in either petitioner's brief or the cases cited therein that even tends to be persuasive that Section 1159 is not facially valid. In fact, **Cox v. New Hampshire**, 312 U. S. 569, 61 S. Ct. 762; **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453; and **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, all discussed in relation to this issue in Part I of this brief, conclusively establish the facial validity of Section 1159. It necessarily follows that petitioner's argument that the lawful procedures to compel issuance of the permit were inadequate is without merit. In this regard, it should be noted that petitioner here did not even make application

for a parade permit, **Walker v. City of Birmingham**, 388 U. S. 307, 87 S. Ct. 1824, whereas in **Poulos v. New Hampshire**, 345 U. S. 395, 73 S. Ct. 760, petitioner applied for such permit and the Council unlawfully denied such permit. This indeed would be a valid basis for distinction even if petitioner in **Poulos** had succeeded under his theory that the unlawful refusal to issue the permit justified his defiant violation of the ordinance. In the absence of facts showing the petitioner here made application for a permit, the presumption is that the Commission would have granted the permits. The rule in this regard has been stated in **Black v. Wilson**, 281 Ala. 6, 198 So. 2d 286:

> "A reversal of the judgment of the trial court would have the effect of bringing about a court order commanding the respondents below to do that which the Legislature has said they should do. The presumption prevails that public officials charged with a duty will perform that duty."

Petitioner in the instant case had not only a court but a pending case in which to contest the validity of Section 1159. On Good Friday, April 12, 1963, when petitioner elected to violate Section 1159 by participating in a mass parade without the required permit, he was acting in defiance of an injunction that enjoined him from mass parading without said permit. The State Court and the injunction suit were available to petitioner had he chosen to contest the validity of Section 1159 by filing a motion to modify or dissolve the injunction. This point was not overlooked by this Honorable Court when it considered this petitioner's contempt conviction for violating that injunction in the case of **Walker v. City of Birmingham**, 388 U. S. 307, pages 318, 319, 87 S. Ct. 124, at page 1831:

> "This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration

of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. The injunction had issued *ex parte*; **if the court had been presented with the petitioner's contentions, it might well have dissolved or at least modified its order in some respects. If it had not done so, Alabama procedure would have provided for an expedited process of appellate review.** It cannot be presumed that the Alabama Courts would have ignored the petitioners' constitutional claims" (Emphasis supplied).

The expedited process of appellate review referred to above is Alabama Supreme Court Rule 47, Title 7, Appendix, Code of Alabama 1940, Recompiled 1958. Rule 47 reads:

"In all Appeals Involving Extraordinary or Remedial Writs. In all appeals involving extraordinary or remedial writs, these rules shall apply unless the court orders otherwise. In appeals from judgments or decrees rendered in habeas corpus, injunction, certiorari, supersedeas, quo warranto, mandamus, prohibition, and appointing or refusing to appoint a receiver proceeding, the appellant within five days after the appeal has been taken, or the appellee within five days after service of the notice of appeal may petition this court to reduce the time for the filing of briefs in the cause and to specify an earlier date for submission of the appeal. Adversary counsel shall be given three days' notice of the date and time of the proposed presentation of the petition to the court. Upon presentation of the petition, the court may prescribe time limita-

tions for the filing of briefs and for submission which are less than otherwise prescribed by the rules, if the court is of the opinion that the normal time allowed by these rules for filing of briefs and submission of the appeal would work injustice, or the appeal involves a question of great public interest affecting the public good and requires an earlier filing of briefs and submission of the appeal. When the court is not in session, such petition may be presented to and acted upon by the senior accessible member of the court. The provision of this rule providing for the earlier filing of briefs and earlier submission of a cause shall not apply in any case where the appellant, because of uncertainty as to his remedy, seeks relief by mandamus as an alternative to his appeal, nor to appeals in cases where the injunctive relief involved was merely incidental to other relief sought."

Even if we presume petitioner had applied for the parade permit, as required by Section 1159, and been refused, a presumption that we do not think is valid, **Black v. Wilson**, 281 Ala. 6, 198 So. 2d 286, and had then sought to compel its issuance by "mandamus", Rule 47 provides the same expedited process for appellate review as in cases involving injunctions. Its provisions apply to "mandamus" proceedings as well as to injunctions.

There can be no doubt that the Alabama Courts are on notice that a petitioner's action, whether a "motion to dissolve" an injunction or "mandamus" to compel issuance of a permit, as required by Section 1159, must be handled expeditiously. This is the obvious import of this Honorable Court's statement[9] in **Walker v. City of Birmingham**, 388 U. S. 307, at pages 318, 319, that:

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[9] The Supreme Court of Alabama approved this statement in relying upon **Walker** in its **Shuttlesworth** opinion and decision. Therefore, the circuit courts of Alabama are put on notice of its requirements and their duty to comply therewith.

"This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustrations of their constitutional claims."

Alabama Circuit Courts will comply with this mandate but should a Circuit Court in Alabama fail in this regard, then certainly expeditious relief can be had through the Alabama Supreme Court by calling its supervisory powers over circuit courts into action. These supervisory powers are conferred upon it in the Alabama Constitution of 1901, Article 6, Section 140:

"Sec. 140. Except in cases otherwise directed in this Constitution, the supreme court shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law, except where jurisdiction over appeals is vested in some inferior court, and made final therein; **provided, that the supreme court shall have power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions.**" (Emphasis supplied.)

CONCLUSION.

It is respectfully requested that the judgment of the Alabama Supreme Court be affirmed.

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APPENDIX.

"Sec. 1159. Parading.

It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such paarde, procession or other public demonstration. The commission shall grant a written permit for such paarde, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral procession."

Section 1159 as construed by the Alabama Supreme Court in 206 So. 2d 348, 281 Ala. 542 in **Shuttlesworth v. City of Birmingham.**

The Commission in issuing parade permits under the provisions of Section 1159:

1. May not censor what is to be said or displayed.

2. Must be guided only by safety, comfort and convenience of persons using the streets, sidewalks and other public ways.

3. A denial would be warranted only if after investigation, it is found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed.

4. May be applied only when a formal procession or march occurs.

5. A permit may not be refused solely on the ground that a parade, procession or other public demonstration might tend to provoke disorderly conduct.

6. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed.

If they should act arbitrarily, resort may be had to the courts. 206 So. 2d 350-352.

SUPREME COURT OF THE UNITED STATES

No. 42.—October Term, 1968.

Fred L. Shuttlesworth, Petitioner, *v.* City of Birmingham, Ala. } On Writ of Certiorari to the Supreme Court of Alabama.

[March 10, 1969.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner stands convicted for violating an ordinance of Birmingham, Alabama, making it an offense to participate in any "parade or procession or other public demonstration" without first obtaining a permit from the City Commission. The question before us is whether that conviction can be squared with the Constitution of the United States.

On the afternoon of April 12, Good Friday 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks the marchers were stopped by the Birmingham police, and were arrested for violating § 1159 of the General Code of Birmingham. That ordinance reads as follows:

> "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
>
> "To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.
>
> "The two preceding paragraphs, however, shall not apply to funeral processions."

The petitioner was convicted for violation of § 1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a $75 fine and $24 costs. The Alabama Court of Appeals reversed the judgment of conviction, holding the evidence was insufficient "to show a procession which would require, under the terms of § 1159,

the getting of a permit," that the ordinance had been applied in a discriminatory fashion, and that it was unconstitutional in imposing an "invidious prior restraint" without ascertainable standards for the granting of permits. 43 Ala. App. 68, 180 So. 2d 114. The Supreme Court of Alabama, however, giving the language of § 1159 an extraordinarily narrow construction, reversed the judgment of the Court of Appeals and reinstated the conviction. 281 Ala. 542, 206 So. 2d 348. We granted certiorari to consider the petitioner's constitutional claims. 390 U. S. 1023.

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," [1] or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.[2] "It is settled by a long line of recent

[1] Except funeral processions.

[2] See *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147, 163–165; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Jones* v. *Opelika*, 316 U. S. 584, 600 (Stone, C. J., dissenting), 611 (Murphy, J., dissenting), vacated and previous dissenting opinions adopted *per curiam*, 319 U. S. 103; *Marsh* v. *Alabama*, 326 U. S. 501; *Tucker* v. *Texas*, 326 U. S. 517; *Saia* v. *New York*, 334 U. S. 558; *Kunz* v. *New York*, 340 U. S. 290; *Niemotko* v. *Maryland*, 340 U. S. 268; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films, Inc.* v. *Department*

decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *Baxley*, 355 U. S. 313, 322. And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it, and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.[3] "The Constitution can hardly be thought to deny to one subject to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Jones* v. *Opelika*, 316 U. S. 584, 602, adopted *per curiam* on rehearing, 319 U. S. 103, 104.

It is argued, however, that what was involved here was not "pure speech," but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Cox* v.

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of Education, 346 U. S. 587; *Staub* v. *Baxley*, 355 U. S. 313; *Cox* v. *Louisiana*, 379 U. S. 536; *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676.

[3] *Lovell* v. *Griffin*, 303 U. S., at 452–453; *Schneider* v. *State*, 308 U. S., at 159, 165; *Largent* v. *Texas*, 318 U. S., at 419, 422; *Jones* v. *Opelika*, 316 U. S., at 602, adopted *per curiam* on rehearing, 319 U. S., at 104; *Staub* v. *Baxley*, 355 U. S., at 319; *Freedman* v. *Maryland*, 380 U. S. 51, 56–57.

Louisiana, 379 U. S. 536, 555. "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.*, at 554–555.

But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection. *Cox* v. *Louisiana*, *supra*; *Edwards* v. *South Carolina*, 372 U. S. 229; *Thornhill* v. *Alabama*, 310 U. S. 88. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Hague* v. *C. I. O.*, 307 U. S. 496, 515–516 (opinion of Mr. Justice Roberts, joined by MR. JUSTICE BLACK).

Accordingly, "[a]lthough this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Kunz* v. *New York*, 340 U. S. 290, 294. See also *Saia* v. *New York*, 334 U. S. 558; *Niemotko* v. *Maryland*, 340 U. S. 268. Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or with-

holding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.

Understandably, under these settled principles, the Alabama Court of Appeals was unable to reach any conclusion other than that § 1159 was unconstitutional. The terms of the Birmingham ordinance clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks.

It is said, however, that no matter how constitutionally invalid the Birmingham ordinance may have been as it was written, nonetheless the authoritative construction that has now been given it by the Supreme Court of Alabama has so modified and narrowed its terms as to render it constitutionally acceptable. It is true that in affirming the petitioner's conviction in the present case, the Supreme Court of Alabama performed a remarkable job of plastic surgery upon the face of the ordinance. The court stated that when § 1159 provided that the City Commission could withhold a permit whenever "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require," the ordinance really meant something quite different:

> "[W]e do not construe this [language] as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. . . . The members of the Commission may not act as censors of what is to be said or displayed in any parade. . . .

"[We] do not construe § 1159 as conferring upon the 'commission' of the City of Birmingham the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct.

"We also hold that under § 1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed." 281 Ala., at 545–546, 206 So. 2d, at 350–352.

In transforming § 1159 into an ordinance authorizing no more than the objective and even-handed regulation of traffic on Birmingham's streets and public ways, the Supreme Court of Alabama made a commendable effort to give the legislation "a field of operation within constitutional limits." 281 Ala., at 544, 206 So. 2d, at 350. We may assume that this exercise was successful, and that the ordinance as now authoritatively construed would pass constitutional muster.[4] It does not follow,

[4] The validity of this assumption would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit. Cf. *Poulos* v. *New Hampshire*, 345 U. S. 395, 420 (Frankfurter, J., concurring); *Freedman* v. *Maryland*, 380 U. S. 51. See also the concurring opinion of MR. JUSTICE HARLAN, *post*, p. —.

however, that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court in November of 1967 necessarily serves to restore constitutional validity to a conviction that occurred in 1963 under the ordinance as it was written. The inquiry in every case must be that stated by Chief Justice Hughes in *Cox* v. *New Hampshire*, 312 U. S. 569—whether control of the use of the streets for a parade or procession was, in fact, "exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.*, at 574.

In *Cox* the Court found that control of the streets had not been exerted unconstitutionally. There the Court was dealing with a parade-permit statute that was silent as to the criteria governing the granting of permits. In affirming the appellants' convictions for parading without a permit, the New Hampshire Supreme Court had construed the statute to require the issuance of a permit to anybody who applied, subject only to the power of the licensing authority to specify the "time, place, and manner" of the parade in order to accommodate competing demands for public use of the streets. This Court accepted the state court's characterization of the statute, and its assurance that the appellants " 'had a right, under the Act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance.' " 312 U. S., at 576. In affirming the New Hampshire judgment, however, this Court was careful to emphasize:

> "There is no evidence that the statute has been administered otherwise than in the fair and non-

discriminatory manner which the state court has construed it to require." *Id.*, at 577.

In the present case we are confronted with quite a different situation. In April of 1963 the ordinance that was on the books in Birmingham contained language that affirmatively conferred upon the members of the Commission absolute power to refuse a parade permit whenever they thought "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." It would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later; and, with First Amendment rights hanging in the balance, we would hesitate long before assuming that either the members of the Commission or the petitioner possessed any such clairvoyance at the time of the Good Friday march.

But we need not deal in assumptions. For, as the respondent in this case has reminded us, in assessing the constitutional claims of the petitioner, "[i]t is less than realistic to ignore the surrounding relevant circumstances. These include not only facts developed in the Record in this case, but also those shown in the opinions in the related case of *Walker* v. *City of Birmingham* (1967), 388 U. S. 307 . . . ."[5] The petitioner here was one of the petitioners in the *Walker* case, in which, just two Terms ago, we had before us a record showing many of the "surrounding relevant circumstances" of the Good Friday march. As the respondent suggests, we may properly take judicial notice of the record in that litigation between the same parties who are now before us.[6]

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[5] Brief for Respondent, at 1–2.

[6] *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336, and cases cited therein.

Uncontradicted testimony was offered in *Walker* to show that over a week before the Good Friday march petitioner Shuttlesworth sent a representative to apply for a parade permit. She went to the City Hall and asked "to see the person or persons in charge to issue permits, permits for parading, picketing and demonstrating." She was directed to Commissioner Connor, who denied her request in no uncertain terms. "He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice." 388 U. S., at 317, n. 9, 325, 335, 339.

Two days later petitioner Shuttlesworth himself sent a telegram to Commissioner Connor requesting, on behalf of his organization, a permit to picket "against the injustices of segregation and discrimination." His request specified the sidewalks where the picketing would take place, and stated that "the normal rules of picketing" would be obeyed. In reply, the Commissioner sent a wire stating that permits were the responsibility of the entire Commission rather than of a single Commissioner, and closing with the blunt admonition: "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama." *Id.*, at 318, n. 10, 325, 335–336, 339–340.[7]

These "surrounding relevant circumstances" make it indisputably clear, we think, that in April of 1963—at

[7] The legal and constitutional issues involved in the *Walker* case were quite different from those involved here. The Court recently summarized the *Walker* decision as follows:

"In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity." *Carroll* v. *President and Commissioners of Princess Anne*, — U. S. —, —.

least with respect to this petitioner and his organization [8]—the city authorities thought the ordinance meant exactly what it said. The petitioner was clearly given to understand that under no circumstances would he and his group be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize traffic problems. There is no indication whatever that the authorities considered themselves obligated—as the Alabama Supreme Court more than four years later said that they were—to issue a permit "if, after investigation [they] found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed."

This case, therefore, is a far cry from *Cox* v. *New Hampshire, supra,* where it could be said that there was nothing to show "that the statute has been administered otherwise than in the . . . manner which the state court has construed it to require." Here, by contrast, it is evident that the ordinance was administered so as, in the words of Chief Justice Hughes, "to deny or unwarrantedly abridge the right of assembly and the opportunities for communication of thought . . . immemorially associated with resort to public places." The judgment is

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[8] In *Walker* the petitioner made an offer of proof that parade permits had been issued to other groups by the city clerk at the request of the traffic bureau of the police department. 388 U. S., at 325–326, 336, 340.

SUPREME COURT OF THE UNITED STATES

No. 42.—October Term, 1968.

Fred L. Shuttlesworth, Petitioner, v. City of Birmingham, Ala. | On Writ of Certiorari to the Supreme Court of Alabama.

[March 10, 1969.]

Mr. Justice Harlan, concurring.

The Alabama Supreme Court's opinion makes it clear that if petitioner Shuttlesworth had carried his efforts to obtain a parade permit to the highest state court, he could have required the city authorities to grant permission for his march, so long as his proposals were consistent with Birmingham's interest in traffic control. Thus, the difficult question this case presents is whether the Fourteenth Amendment ever bars a State from punishing a citizen for marching without a permit which could have been procured if all available remedies had been pursued.

The Court answers that a citizen is entitled to rely on the statutory construction adopted by the state officials who are on the frontline, administering the permit scheme. If these officials construe a vague statute unconstitutionally, the citizen may take them at their word, and act on the assumption that the statute is void. The Court's holding seems to me to carry seeds of mischief that may impair the conceded ability of the authorities to regulate the use of public thoroughfares in the interests of all. The right to ignore a permit requirement should, in my view, be made to turn on something more substantial than a minor official's view of his authority under the governing statute.

Simply because an inferior state official indicates his view as to a statute's scope, it does not follow that the

State's judiciary will come to the same conclusion. Situations do exist, however, in which there can be no effective review of the decision of an inferior state official. In the present case, for example, the decision of Commissioner Connor had the practical effect of the decision of a court of last resort. One week before the Good Friday march, Shuttlesworth learned from Connor that he, as Commissioner for Public Safety, would not issue parade permits, and that the marchers would have to apply to the entire City Commission.[1] But Birmingham's ordinances did not require a prompt decision by the City Commission.[2] Nor did the State of Alabama

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[1] I agree with my Brother STEWART that we may properly take judicial notice of the evidence of record in *Walker* v. *Birmingham*, 388 U. S. 307 (1967). See 9 Wigmore, Evidence § 2579, at 570 (1940); *Butler* v. *Eaton*, 141 U. S. 240 (1891); *Craemer* v. *Washington*, 168 U. S. 124 (1898). That record shows that in response to a request for permission to march on April 5 and 6, Mr. Connor replied by telegram on April 5:

"Under the provisions of the City Code of Birmingham, a permit to picket as requested by you cannot be granted by me individually but is the responsiboity [*sic*] of the entire Commission. I insist you and your people do not start any picketing on the streets of Birmingham, Alabama."

"Eugene 'Bull' Connor, Commissioner of Public Safety."

See *Walker* v. *Birmingham*, No. 249, October Term, 1966, Transcript of Record, at 415. Mr. Connor's telegram was received in evidence at trial. See Transcript, *supra*, at 350.

I do not, however, find it appropriate to rely upon the slightly earlier episode detailed in my Brother STEWART's opinion, *ante*, at 10, as the trial judge ruled the uncontradicted supporting testimony inadmissible. See Transcript, *supra*, at 355.

[2] Section 1159 does not require the City Commission to act on an application within any fixed amount of time. Indeed, by the time Connor definitively declared that he could not issue parade permits, it is not at all clear that petitioner could even have made a timely permit application to the City Commission at its only remaining regular session set before the scheduled Good Friday march. See General City Code of Birmingham § 21 (1944). While

provide for a speedy court review of the denial of a parade permit.[3]

Given the absence of speedy procedures, Reverend Shuttlesworth and his associates were faced with a serious dilemma when they received their notice from Mr. Connor. If they attempted to exhaust the administrative and judicial remedies provided by Alabama law, it was almost certain that no effective relief could be obtained by Good Friday. Since the right to engage in peaceful and orderly political demonstrations is, under appropriate conditions, a fundamental aspect of the "liberty" protected by the Fourteenth Amendment, see *Stromberg* v. *California*, 283 U. S. 359, 368–370 (1931); *Hague* v. *C. I. O.*, 307 U. S. 496, 515–516 (1939) (opinion of Mr. Justice Roberts); *Garner* v. *Louisiana*, 368 U. S. 157, 201–203 (1961) (opinion of HARLAN, J.), the petitioner was not obliged to invoke procedures which could not give him effective relief. With fundamental rights at stake, he was entitled to adopt the more probable meaning of the ordinance and act on his belief that the city's permit regulations were unconstitutional.

It may be suggested, however, that Shuttlesworth's dilemma was of his own making. He could have requested a permit months in advance of Good Friday, thereby allowing Alabama's administrative and judicial machinery the necessary time to operate fully before the date set for the march. But such a suggestion ignores the principle established in *Freedman* v. *Maryland*, 380 U. S. 51, 58–61 (1965), which prohibits the States from requiring persons to invoke unduly

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the 1964 City Code makes it clear that petitioner's permit application would have been considered out of time, see § 2–10, the 1944 Code, which was applicable in 1963, is not clear on this point.

[3] Although Shuttlesworth could have petitioned for a writ of mandamus in the Alabama Circuit Court if the City Commission denied his application, that state court is not obliged to render a decision within any fixed period of time.

cumbersome and time-consuming procedures before they may exercise their constitutional right of expression. *Freedman* holds that if the State is to protect the public from obscene movies, it must afford exhibitors a speedy administrative or judicial right of review, lest "the victorious exhibitor might find the most propitious opportunity for exhibition [passed]." *Id.*, at 61. The *Freedman* principle is applicable here.[4] The right to assemble peaceably to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value. Moreover, slow-moving procedures have a much more severe impact in the instant case than they had in *Freedman*. Though a movie exhibitor might suffer some financial loss if he were obliged to wait for a year or two while the administrative and judicial mills ground out a result, it is nevertheless quite likely that the public would ultimately see the film. In contrast, timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. To

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[4] None of our past decisions have squarely considered whether parade licenses must be handled on an expedited basis. In *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), the question was not argued. In *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953), Poulos' request for a permit to conduct religious services in a public park was refused by the Portsmouth City Council seven and one-half weeks before the first scheduled event. Since the time remaining was sufficient to obtain relief by way of mandamus, see 345 U. S., at 419–420 (opinion of Mr. Justice Frankfurter), there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure. And, of course, those cases which struck down regulatory schemes which purported to issue licenses on the basis of unconstitutional standards did not reach the question presented here. See, *e. g.*, *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147, 163–165 (1939); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Staub* v. *Baxley*, 355 U. S. 313 (1958).

require Shuttlesworth to submit his parade permit application months in advance would place a severe burden upon the exercise of his constitutionally protected rights. Cf. *Williams* v. *Rhodes*, 393 U. S. 23, 33 (1968).

I do not mean to suggest that a State or city may not reasonably require that parade permit applications be submitted early enough to allow the authorities and the judiciary to determine whether the parade proposal is consistent with the important interests respecting the use of the streets which local authority may legitimately protect. But such applications must be handled on an expedited basis so that rights of political expression will not be lost in a maze of cumbersome and slow-moving procedures.

Neither the City of Birmingham nor the State of Alabama has established such expedited procedures. See nn. 2 and 3, *supra*. Indeed, the city's parade ordinance does not establish any procedure at all to govern the consideration of applications. Section 1159 of the City Code does not state *when* an application must be submitted if it is to be considered timely. The ordinance does not state *how* an application is to be submitted to the "City Commission."[5] Nor have regulations been published which would answer these questions.[6]

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[5] It would be most remarkable if every parade application involving the march of 52 persons is considered in a plenary manner by the principal governmental body of a city so large as Birmingham. In fact, an offer of proof was made in the *Walker* proceedings that the City Commission had never passed on permit applications in the past, but had delegated the task to inferior officials. See Transcript, *supra*, n. 1, at 290. The proof was not admitted on the ground that it was irrelevant. *Ibid.*

[6] At the trial in *Walker* v. *Birmingham*, the City Clerk, who kept records of the parade permits that had been granted, stated that no regulations had been issued to fill in the gaps left by the Ordinance. See Transcript, *supra*, n. 1, at 286.

In the absence of any guidelines, the most that can fairly be asked of petitioner is that he make a good faith effort to obtain a permit from the city authorities. Shuttlesworth so acted when he approached the city official most likely to have the authority to deal with permit applications in an expedited manner—Commissioner Connor was the member of the City Commission in charge of public safety. It was Connor, not Shuttlesworth, who broke off all discussions relating to the issuance of permits. After the Commissioner declared that he lacked the power to act, it was reasonable to believe that no public authority would act in time. Since neither the city nor the State provided sufficiently expedited procedures for the consideration of parade permits, petitioner Shuttlesworth cannot be punished for the exercise of his constitutionally protected right of political expression.[7]

On this basis I concur in the reversal of the judgment of the Alabama Supreme Court.

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[7] I do not reach the question whether the principle followed in such cases as *Lovell*, *Schneider*, *Largent*, and *Staub*, see n. 4, *supra*, allowing persons to ignore entirely licensing schemes which unconstitutionally impinge on other forms of free expression, should be extended to cover "parade" permit statutes involving, as they do, a particularly important state interest.